

Concrete Private Interest in Regulatory Enforcement: Tradable Environmental Resource Rights as a Basis for Standing

Danieli Evans†

This Note proposes a novel solution to standing problems faced by environmental plaintiffs seeking to enforce, or to compel agencies to enforce, environmental regulation. It argues that environmental plaintiffs should be able to obtain standing to bring an Administrative Procedure Act (APA) review action or a citizen suit based on ownership of private tradable environmental resource rights, created by increasingly popular environmental privatization programs. These rights should operate as a basis for standing even for plaintiffs who would otherwise be unable to meet standing requirements of individual injury, causation, and redressability. Relying on tradable rights to environmental resources as a basis for standing in APA review actions or citizen suits would maximize the benefits of citizen participation while averting the concerns associated with broad grants of standing.

Introduction	202
I. Attempts To Counteract Agency Inaction: Citizen Suits and APA	
Review Proceedings.....	205
A. <i>Benefits of Citizen Enforcement and APA Review Actions</i>	208
B. <i>Arguments Against Citizen Participation</i>	210
II. Standing Doctrine Limiting Citizen Participation	214
III. Environmental Resource Privatization Programs: Concrete Individual	
Interest in Enforcement of Environmental Protection Legislation.....	221
IV. Standing Based on Tradable Rights	224
A. <i>Establishing Concrete and Particularized Individual Interest</i>	224
1. Standing Based on a Property Interest.....	225
a. Are Tradable Rights Property?	225
b. Property Interests and Standing	227
2. Standing Based on Market Interest.....	229
B. <i>Meeting the Causal Nexus Requirement</i>	231
C. <i>Meeting the “Zone of Interests” Requirement</i>	232

† Yale Law School, J.D., 2012; University of Miami, A.B., 2009. I would like to thank Jerry Mashaw and Claire Priest for guidance in developing this Note; Bruce Ackerman, Dan Kahan, and Reva Siegel for providing ongoing mentorship and learning opportunities; Linda Greenhouse for continuously engaging in discussion; Daniel Hemel for valuable comments; and Connor Sullivan, Sebastian Swett, and the staff of the *Yale Journal on Regulation* for their editing.

V. Case Studies.....	234
A. <i>Individual Transferable Fishing Quotas</i>	234
B. <i>New Jersey Pinelands Transferable Development Rights</i>	236
C. <i>Litigation Involving Tradable Rights</i>	237
Conclusion	239
A. <i>Confronting Potential Objections</i>	239
B. <i>Advantages of Tradable Rights as a Basis for Standing</i>	241

Introduction

During the latter part of the twentieth century, the political and judicial branches have grappled with agency failure to implement regulatory legislation, especially environmental protection measures.¹ To enhance enforcement of regulatory legislation, Congress provided for citizen enforcement suits and Administrative Procedures Act (APA) review actions. These measures were designed to take advantage of public citizens' diverse knowledge and motivation by enabling citizens to participate, through courts, in policing and supplementing agency enforcement and implementation of public interest regulations.² Incidents like the recent oil spill in the Gulf of Mexico illustrate that citizens are often in a unique position to recognize, in advance, failures to comply with regulatory obligations that create grave environmental hazards. Thus, citizen participation stands to prevent hazardous regulatory failures, guarding the public value and safety. However, these means of citizen participation—both citizen enforcement actions and APA review actions—have been severely curtailed by standing requirements imposed by courts. In particular, courts hold that these plaintiffs, regardless of the validity of their underlying claims, are unable to bring suit because they cannot sufficiently demonstrate *concrete and particularized* injury that is unique to them.³

1. For examples of this literature, see JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978); PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* (1981); KAYE LEHMAN SCHLOZMAN & JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* (1986); *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987); and Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

2. I propose that tradable rights may serve as a basis for standing in two different types of actions that I refer to generally as “citizen participation”: (a) citizen enforcement actions, or citizen suits, where a statute grants members of the public the right to prosecute private entities or state and local actors that are violating environmental protection laws; and (b) APA review actions in which members of the public sue an agency itself for failing to implement or comply with its own enabling legislation. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1 (1995) (discussing citizens playing the role of private attorneys general in citizen suits against private entities and citizens performing a mandamus function in APA suits against agencies).

3. E.g., Adam Babich, *Citizen Suits: The Teeth in Public Participation*, 25 ENVTL. L. REP. 10141 (1995); Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 697 (2010); Douglas O. Waikart, *Report of the Committee on the*

This Note argues that environmental privatization programs—a separate and seemingly unrelated measure designed to promote environmental conservation—may provide a partial solution to the standing problem in citizen enforcement and APA review actions. Environmental privatization programs create private tradable rights to environmental resources and are designed to force users to internalize the costs of depleting common resources. These programs have been immensely popular, and two Presidents have instructed regulators to prefer these programs as an alternative to direct regulation.⁴ Because these programs require all users to purchase rights to use the resource, and the price of the resource depends on the resource’s aggregate availability, each tradable right’s value necessarily depends on the total abundance of the resource as well as on competition in the market for the resource. Any action that either threatens the resource’s aggregate abundance or impacts the market for resource rights threatens the holder’s concrete individual interest.

To date, no one has considered the relationship between tradable rights and standing. Many commentators have lamented standing barriers to citizen enforcement. The closest any commentator has come to addressing this relationship is Cass Sunstein’s argument that federal courts should accept jurisdiction over citizen suits because Congress, in granting any citizen the right to sue to enforce a regulatory statute, effectively confers a “property right in a certain state of affairs” on citizens, which they should be able to vindicate in court.⁵

My argument builds on this notion, but it avoids several problems in Sunstein’s characterization of citizen suit provisions as themselves conferring a

Environment, 19 ENERGY L.J. 181, 195 (1998) (“Standing to sue has been a ‘perennial’ issue in environmental citizen suit litigation.”); William Glaberson, *Novel Antipollution Tool Is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1; see also Linda Greenhouse, *Who Stands for Standing?*, N.Y. TIMES OPINIONATOR BLOG (Sept. 23, 2010, 9:44 PM), <http://opinionator.blogs.nytimes.com/2010/09/23/who-stands-for-standing> (asserting that “raising the barriers to standing is a core part of the[] agenda” of Chief Justice Roberts and his allies, and that “the question of standing” is being made “one of the hot legal topics of the coming months or even years”).

4. President Clinton issued an Executive Order instructing agencies to “identify and assess available alternatives to direct regulation . . . such as . . . marketable permits.” Executive Order 12866 of September 30, 1993: Regulatory Planning and Review, 58 Fed. Reg. 51,735 (Oct. 4, 1993). President Obama reiterated this instruction. Executive Order 13563 of January 18, 2011: Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011). Many regulators at the federal and state level have opted for tradable rights approach. For instance, the EPA has pioneered water quality trading with twenty-five programs creating private tradable water pollution permits. EPA, WATER QUALITY TRADING EVALUATION: FINAL REPORT 2 (Oct. 2008), available at <http://www.epa.gov/evaluate/pdf/wqt.pdf>.

5. Cass Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries”, and Article III*, 91 MICH. L. REV. 163, 191, 235 (1992) (“Invasion of that property right is the relevant injury . . . [the court] would be faced with a suit brought by property holders equipped with causes of action.”). However, Sunstein did not connect this idea with environmental privatization programs or private rights to environmental resources. Further, his account seems to suggest creating a property right that would give holders an independent cause of action against the government when the right is violated. I am not suggesting the creation of a separate cause of action outside citizen suits or APA actions, but rather proposing a means of meeting standing requirements in these existing causes of action.

property right.⁶ Additionally, my objective differs from Sunstein's argument, which seems to be that courts should not impose an individualized injury requirement in public interest citizen suits, thus *defending* the constitutional legitimacy of courts hearing non-individualized public grievances in the context of citizen suits. Instead, my objective is to find a way for citizen plaintiffs to meet individualized interest requirements as they currently exist. My theory *reconciles* Congress's goals of promoting citizen enforcement with the courts' refusal to adjudicate general public grievances. This Note argues that existing Tradable-rights programs have, in a moderated sense, given practicable effect to Sunstein's description by creating concrete *and* individualized private interests in enforcing compliance with, and implementation of, environmental protection legislation.⁷

Providing a basis for standing in citizen suits and APA review proceedings, tradable rights could optimize the benefits of citizen participation while ameliorating many of the concerns associated with it. Using tradable rights as a basis for standing would provide access to the courts for interested citizens who may have more information, motivation, or funding to enforce environmental protection legislation than the executive branch. At the same time, because tradable resource rights holders have a concrete financial interest whose value is automatically linked to a resource's overall abundance, and the rights are necessarily scarce, plaintiffs would still meet constitutional requirements that include showing a concrete individualized interest. This would also ameliorate prudential concerns about excessive citizen enforcement actions and guarantee that litigants have a sufficient and concrete financial stake in the controversy to ensure zealous advocacy. Because a plaintiff holding tradable rights would need to show that the regulatory decision will likely result in actual devaluation of her tradable rights, litigants would be unable to bring citizen suits based on violations of technical procedural requirements that do

6. My argument avoids two shortcomings of Sunstein's claim. First, Sunstein suggests recognizing new abstract property interests conferred on all members of the public indistinguishably, thereby disregarding the Court's Article III standing jurisprudence requiring that a plaintiff have an individualized interest apart from the public interest. Second, in suggesting a cause of action is based on private property, Sunstein's argument potentially implicates the Takings Clause and other types of financial liability for regulatory decisions. My argument avoids both of these problems by focusing on publicly attainable interests in enforcement of regulatory legislation that establish an individualized interest apart from the public interest at large, but are defined in less absolute terms than private property rights which might implicate takings liability.

7. No court has directly addressed the question of whether ownership of tradable rights is sufficient for standing to sue based on violations or failures to regulate the underlying resource. In the most informative case, the plaintiff was an environmental organization whose main purpose was promoting the use of tradable emissions programs. *Clean Air Mkts. Grp. v. Pataki*, 194 F. Supp. 2d 147, 155-57 (N.D.N.Y. 2002), *aff'd*, 338 F.3d 82 (2d Cir. 2003). Based on one member's ownership of tradable emissions allowances, the plaintiff organization was found to have standing to challenge government action that devalued emissions allowances in contravention of the Clean Air Act. This case strongly suggests that ownership of private rights in environmental resources would be a sufficient basis for standing to seek review of actions impacting the resources underlying those rights, and the rights' value.

not actually threaten to harm the resource or the market for it. This discussion only considers causes of action under the APA (which does not waive sovereign immunity for damages actions) and citizen suit provisions, where the principal available remedy is forced compliance. Because these statutes permit only prospective enforcement and not monetary damages, each violation can only result in one remedy: an injunction. Therefore, this proposal does not run the risk of significantly increasing the total number of enforcement actions against government or private actors or of provoking multiple suits on the basis of one illegal action or private violation.

This Note proceeds in five Parts. Part I addresses the problem that animates this discussion—agency failure to fully or properly implement regulatory legislation, particularly environmental protection legislation—and congressional attempts to counteract this through citizen enforcement and APA review actions. Part II describes how these enforcement mechanisms have been limited by constitutional standing requirements of individual interest and causation/redressability. Part III discusses environmental privatization programs. Part IV sets out the argument that holding tradable environmental rights would enable holders to meet standing requirements by (a) conferring a concrete and particularized individual interest akin to those consistently recognized as sufficient for standing, (b) establishing a causal nexus between the regulatory failure and threat to the plaintiff's individualized interest, and (c) bringing holders within the "zone of interests" protected by legislation governing the underlying resource. Part V considers several case studies describing how existing Tradable-rights programs would likely confer standing on rights holders and what types of actions plaintiffs might bring under existing regimes. The Conclusion argues that, in addition to expanding the availability of citizen participation, using tradable rights as a basis for standing would maximize the benefit of citizen participation while avoiding many of the drawbacks associated with it.

I. Attempts To Counteract Agency Inaction: Citizen Suits and APA Review Proceedings

This Part discusses two congressional measures to enhance citizen participation in agency oversight—citizen enforcement actions and APA review actions—and briefly addresses the benefits and drawbacks associated with these mechanisms for citizen participation.⁸ The latter part of the twentieth century saw increasing distrust of federal agencies and awareness of the potential for agency capture or laxness, leading to inadequate enforcement of

8. The following discussion of citizen participation in agency oversight does not aspire to exhaust the topic or to argue comprehensively in favor of citizen participation. This Note seeks to discuss the potential benefits and drawbacks to citizen participation and explain how tradable rights as a basis for standing may be a compromise that maximizes benefits while ameliorating drawbacks.

regulatory legislation.⁹ Many commentators have observed the inherent shortcomings in relying on agencies alone to enforce regulatory legislation: agencies become complacent in oversight; they develop lasting relationships with industry entities; they struggle to police the wide range of discrete or secretive violations that may occur; and they face budgetary and personnel constraints that require selective enforcement in the face of widespread violations.¹⁰ Administrative agencies interact with the same regulated entities over long periods. This allows them to develop relationships with the regulated parties and build up expertise about the regulated industry. However, these lasting relationships may also allow agencies to become “captured” by the interests and members of the regulated industry, or at least create the hazard that officials may lose perspective in increasing attachment to their positions or to the concerns of one isolated industry. Furthermore, agency officials, lacking a strong personal stake in zealous enforcement of regulation, may become ineffective.¹¹

The potential for agency failure was illustrated in the Exxon Valdez oil spill, in which government regulators failed to address violations of safety requirements that were known before the oil spill occurred.¹² This also happened in the 1979 Ixtoc oil spill in Mexico’s Bay of Campeche¹³ and again

9. WILLIAM DRAYTON, *AMERICA’S TOXIC PROTECTION GAP: THE COLLAPSE OF COMPLIANCE WITH THE NATION’S TOXICS LAW 6* (1984) (describing the perception that the Reagan Administration, generally viewed as unsympathetic towards environmental regulation, permitted a “collapse of compliance with the nation’s environmental protection laws”); Bruce A. Ackerman & Richard Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1344 (1985) (discussing the “egregious failure of the EPA and associated state agencies to enforce the laws on the books in a timely and effective way”); Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 870-71 (1985) (commenting on the “perception among environmental groups that the first Reagan Administration was rapidly undermining compliance with environmental laws”); see also William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972, Part I*, 22 STAN. ENVTL. L.J. 145, 194-99 (2003) (discussing the failure of government to implement and enforce earlier water pollution control efforts that preceded the enactment of modern water pollution control legislation providing for citizen suits); Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens—Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401 (2004) (describing Congress’s desire to ensure comprehensive enforcement of environment statutes by leveraging the EPA, states, and private citizens).

10. *Sierra Club v. Morton*, 405 U.S. 727, 745-47 (1972) (“[T]he pressures on agencies for favorable action one way or the other are enormous. . . . The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.”) (Douglas, J., dissenting) (footnote omitted).

11. See Babich, *supra* note 3; Miller, *supra* note 9; Sunstein, *supra* note 5; Ian Urbina, *U.S. Said To Allow Drilling Without Needed Permits*, N.Y. TIMES, May 13, 2010, at A1 (discussing the Minerals Management Service’s failure to obtain permits as required by the Endangered Species Act and Marine Mammal Protection Act before allowing drilling in the Gulf of Mexico).

12. Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 699-701 (1995).

13. *Oil Spill Q & A with Earthjustice Attorney David Guest: “I Wasn’t Surprised At All”*, EARTHJUSTICE (June 23, 2010), <http://earthjustice.org/features/oil-spill-q-a-with-earthjustice-attorney->

in the 2010 oil spill in the Gulf of Mexico. The Minerals Management Service's (MMS) records show that before the 2010 Gulf spill, it allowed hundreds of drilling projects to proceed without first obtaining the permits required under the Endangered Species Act (ESA) and the Marine Mammal Protection Act and without ensuring the rig's compliance with blowout prevention safety standards. Scientists inside and outside MMS were aware of MMS's ongoing failure to enforce the law.¹⁴ Interior Secretary Ken Salazar testified before the Senate Energy and Natural Resources Committee that his agency had been lax in overseeing drilling in the Gulf of Mexico, stating that MMS must be "clean[ed] up" and that there were "bad apples" in the agency.¹⁵ President Obama stated that government regulators had a "cozy relationship" with the energy industry.¹⁶ This event illustrates the potential for agencies to experience lapses in complying with their legal obligations and the need for oversight of agency implementation. It also shows that citizens are often aware of regulatory failures or shortcomings before disasters occur. Recognizing this reality, Congress has provided two distinct mechanisms to enable citizens to participate in enforcing compliance with regulatory legislation: citizen enforcement actions and review of agency action under the APA.¹⁷ It is important to note that these are two different procedures enabling citizen participation. A citizen enforcement action refers to a suit against a private violator pursuant to an explicit statutory provision empowering citizens to bring such actions. An APA review action is a suit against the agency seeking to compel the agency itself to comply with its mandate.

Citizen suit provisions provide a cause of action for any citizen to bring an enforcement action against a private, state, or local entity that fails to comply with regulatory legislation, so long as enforcement is not already underway.¹⁸ Once a citizen brings an enforcement proceeding, the Environmental Protection Agency (EPA) has a right to intervene and prosecute the violation on behalf of

david-guest-i-wasn-t-surprised-at-all (describing how regulators failed to verify that the Ixtoc rig's blowout preventer mechanism met safety standards).

14. Urbina, *supra* note 11; Terry Winckler, *Suit Filed To End Reckless Approach to Offshore Oil Drilling*, EARTHJUSTICE: UNEARTHED (May 18, 2010, 12:37 PM), <http://uneearthed.earthjustice.org/blog/2010-may/suit-filed-end-reckless-approach-offshore-oil-drilling>.

15. H. Josef Hebert & Frederic J. Frommer, Associated Press, *Interior Secretary Acknowledges Lax Oil Regulation*, HERALD SUN (Miami), May 19, 2010, http://www.heraldsun.com/view/full_story/7471492/article-INTERIOR-SECRETARY--OIL-REGULATION-LAX.

16. *Id.*

17. 5 U.S.C. § 500 (2006).

18. The following environmental protection statutes all have citizen suit provisions: Toxic Substances Control Act, 15 U.S.C. § 2619(a) (1) (2006); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (1) (A) (2006); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(a) (1) (2006); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(a) (1) (2006); Clean Water Act 33 U.S.C. § 1365(a) (1) (2006); Marine Protection, Research, and Sanctuary Act, 33 U.S.C. § 1415(g) (1) (2006); Energy Policy and Conservation Act, 42 U.S.C. § 6305(a) (2006); Solid Waste Disposal Act, 42 U.S.C. § 6972(a) (1) (2006); Clean Air Act, 42 U.S.C. § 7604(a) (1) (2006); and Outer Continental Shelf Lands Act, 42 U.S.C. § 1349(a) (1) (2006).

the government. Citizen enforcers may seek penalties and orders requiring compliance and mitigation of past violations. Any penalties assessed against violators are paid to the U.S. Treasury, not the citizen who brought the enforcement proceeding, though plaintiffs' counsel may receive attorney's fees.¹⁹

A second, separate means for citizen oversight is section 702 of the APA, providing that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."²⁰ A party challenging an agency's misinterpretation or implementation of a statute or failure to take action as a statute requires should seek review under the APA.²¹ APA actions differ from citizen suits. Citizen suits are a "means by which private parties may enforce the substantive provisions of the [regulatory statute] against regulated parties-both private entities and Government agencies".²² Where a statute's citizen suit provision might only be invoked to challenge actual violations, an APA review action provides an avenue for challenging the way an agency implements the statute, including the reasonableness of its determinations, regulations, and interpretations under the statute, and failure to take action when the statute suggests it should.²³ The APA thus also enables interested citizens to bring suits to compel a lax agency to perform its duties generally with respect to other regulated parties, or to alter its determinations and regulations implementing the statute if they are unreasonable or do not serve the purpose of the enabling legislation.

A. *Benefits of Citizen Enforcement and APA Review Actions*

Citizen suits have been recognized as a valuable means of promoting compliance with regulatory legislation.²⁴ The public provides a broader source

19. Wendy Naysnerski & Tom Tietenberg, *Private Enforcement of Environmental Law*, 68 LAND ECON. 28 (1992); Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002).

20. Administrative Procedure Act, 5 U.S.C. § 702 (2006). The APA provides a right to judicial review of all "final agency action for which there is no other adequate remedy in a court," and applies universally "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The basis for judicial review granted under the APA is separate and distinct from that granted by a citizen suit provision. If a plaintiff does not have a right to sue based on a citizen suit provision, or the plaintiff's claim based on a citizen suit provision fails, he may seek review separately under this section of the APA. *Id.* §§ 701(a), 704; *Bennett v. Spear*, 520 U.S. 154, 175 (1997); *Alliance To Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 7 (D.D.C. 2007).

21. *Bennett*, 520 U.S. at 173.

22. *Id.*

23. *Id.* at 173-75 (finding that plaintiffs cannot challenge an agency's implementation of the ESA under the statute's citizen suit provision, but they can do so with an APA review action, because the causes of action set forth in the ESA's citizen suit provision are not exclusive and do not supplant those provided by the APA).

24. See *Report of the Committee on the Environment*, 19 ENERGY L.J. 181, 192 (1998) ("Environmental citizen suits are a very significant aspect of federal environmental enforcement litigation in terms of both the frequency of these suits and the severity of the sanctions imposed . . .

of experience, interests, expertise, and funding, than is available in government, and may in some circumstances be better positioned to enforce compliance with environmental regulation than the executive branch. Citizens' interests are more detached and diverse than those of agencies: they interact with a regulated industry in a range of scenarios and have more exposure to the industry's conduct.

Citizen suits have been recognized as effective means of supplementing agency enforcement. The public may in some circumstances be better positioned to enforce compliance with environmental regulation than the executive branch. Citizen enforcement has been shown to increase when agency enforcement decreases,²⁵ and the number of citizen enforcement actions brought against violators is about fivefold more than those brought by the federal government.²⁶ The availability of citizen enforcement actions also incentivizes firms to comply or cooperate with overseeing agencies because of the potential cost of a citizen enforcement action, which is likely to result in higher penalties as well as an award of attorneys' fees.²⁷ Because citizen enforcement and APA review proceedings are publicly visible, they call attention to and delegitimize non-compliance in a way that is much more severe than internal discipline or private negotiations and bargains.²⁸ EPA officials have testified in favor of citizen enforcement actions as complementing their ability to fulfill their duties by increasing resources for prosecuting violations and encouraging regulated entities to seek compliance.²⁹ Citizen enforcement has played a large role in execution of environmental protection legislation, most notably the Clean Water Act (CWA). The effective deployment of citizen suits has given rise to regional citizen organizations dedicated entirely to enforcing the Act in their local ecological settings.³⁰

citizen suit enforcement under . . . federal environmental statutes, such as the CAA, the Resource Conservation and Recovery Act (RCRA), and the Emergency Planning and Community Right-to-Know Act (EPCRA), is growing.”).

25. Naysnerski & Tietenberg, *supra* note 19, at 35 (“While federal enforcement was decreasing in the early 1980s, private enforcement was picking up the slack.”).

26. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 MD. L. REV. 1552, 1609 (1995).

27. Zinn, *supra* note 19, at 135.

28. *Id.* at 97-98.

29. Miller, *supra* note 9, at 411 & n.39 (citing *The Water Quality Act of 1994 and Issues Related to Clean Water Act Reauthorization: Hearings on H.R. 3948 Before the Subcomm. on Water Res. and Env't of the H. Comm. on Pub. Works and Transp.*, 103d Cong. 290 (1994) (statement of Carol M. Browner, Administrator, EPA); *Pending Clean Water Act Legislation: Hearings Before the Subcomm. on Env't and Natural Res. of the H. Comm. on Merch. Marine and Fisheries*, 103d Cong. 212-13 (1994) (statement of Steven A. Herman, Assistant Administrator for Enforcement, EPA)).

30. Michael R. Lozeau, *Tailoring Citizen Enforcement to an Expanding Clean Water Act: The San Francisco Baykeeper Model*, 28 GOLDEN GATE U. L. REV. 429, 442-43 & n.51 (1998) (discussing Hudson RiverKeeper, a program established by Hudson River Fishermen's Association that “maintains a steady docket of citizen enforcement cases based exclusively on pollution of the watershed of the Hudson River”).

APA actions share many of the advantages of citizen suits. The APA provides for suits to challenge an agency's implementation of its enabling statute, such as decisions to adopt rules, policies, or courses of action, without complying with statutory procedures or adequately considering interests that are impacted by those actions, or when implementation arguably deviates from the purpose of the agency's enabling statute. In the context of APA actions, citizens' diverse interests, knowledge, expertise, and interactions with agencies provide the same advantages and ensure that a more complete range of interests and factors are considered in agency decisions that implement and interpret regulatory legislation. By providing a means for drawing out and considering the concerns of citizens with broad interests and interactions with agencies, APA review proceedings counteract the tendency of agencies to become narrowly focused on the area they are charged with regulating and neglect other pertinent concerns or interests.

B. Arguments Against Citizen Participation

Critics of citizen participation—both through citizen enforcement and APA review actions—advance prudential and constitutional arguments against broad grants of standing for public enforcement of federal law. Critics of citizen enforcement actions argue that they thwart agencies' enforcement discretion, which is required because the terms of regulation tend to be over-inclusive, capturing some desirable or innocent activities within the terms of the prohibition. They argue that law enforcement has traditionally been at the discretion of public officers because the inherent over-inclusiveness of legal prohibitions leads to danger of excessive enforcement against parties whose activities are really innocent in terms of the harm the law was intended to prevent.³¹ This argument assumes that officials are less prone to harmful over-enforcement because they are better able to evaluate when enforcement is in the public interest and must enforce selectively due to budgetary constraints. Citizen enforcers, by contrast, may prosecute every violation of the law, regardless of whether prosecution is in the public interest. This is so, critics argue, even though citizen plaintiffs do not reap economic benefit from bringing enforcement actions.³² Critics argue that citizen enforcement actions' awards of attorney's fees enable "a self sustaining, remunerative enforcement project," where environmental advocates use fee awards from citizen suits to search for other violations and finance more enforcement actions.³³ This criticism does

31. Michael S. Greve, *Private Enforcement, Private Rewards: How Environmental Citizen Suits Became an Entitlement Program*, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 105, 106 (Michael S. Greve & Fred L. Smith, Jr. eds. 1992).

32. Environmental statutes providing for citizen suits prohibit citizen-plaintiffs from collecting awards, bounties, or penalties paid. These are collected by the U.S. Treasury. Further, statutes providing for citizen suits make the award of attorney's fees discretionary. *Id.* at 106.

33. *Id.* at 111 (arguing that citizen suits enable "scores of actions, not over substantive environmental violations but over violations of the voluminous paperwork requirements, . . . [that]

not adequately support the postulation that citizen enforcers would prosecute trivial violations of environmental laws when an executive enforcer would not. Considering that citizen enforcers have nothing to gain monetarily from successfully prosecuting a trivial violation, it is difficult to see why any rational actor would expend finite resources like time and effort to enforce an empty technical provision of a regulatory statute against a third party. This seems particularly implausible of citizen enforcers who presumably are typically motivated by ideological or public interest and thus especially concerned with achieving the public purpose of regulation rather than fulfilling the technical letter of the regulatory statute.

These critics also attack the perceived legitimacy of punishment pursuant to citizen enforcement, arguing that “officers of the state are intuitively the most legitimate entities for punishment in light of their constitutional status and universally recognized authority in the social community.”³⁴ This criticism ignores the crucial role of state authority in citizen suits. After all, in a citizen suit, the nature of a violation, the legal duties breached, and the punishment assigned, are all determined by the legislature which originally enacted the statute and the court that adjudicates the citizen suit. In this context, the citizen enforcer acts merely as an instrument of the legislature in bringing potential violations of environmental law to the attention of the courts. Hence, the entities creating and imposing punishment are entities of “constitutional status” with “universally recognized authority in the social community.”

In addition, objections that citizen suits force litigation by foreclosing agency efforts to negotiate or settle with regulated entities, and that citizen suits undermine cooperative federalism,³⁵ also seem inapposite. First, citizen suits are only permitted upon demonstration that the agency has not already undertaken enforcement initiatives, either through federal agents or cooperation with state enforcers. Hence, the implementing agency and any cooperating state agencies have the primary enforcement prerogative. Enforcement initiatives can include settlement or negotiation with regulated entities. Indeed, as noted above, the threat of citizen suits has actually enhanced cooperation and negotiation between agencies and regulated entities, because the threat of citizen suits has encouraged regulated entities to seek compliance enforcement from agencies themselves to avoid costly enforcement actions.³⁶

generate tens of thousands of dollars in attorneys fees and credit projects, [but that] produce no discernable environmental benefits”); see also Robert F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 370, 410 (1988) (arguing that “officers of the state, by virtue of their theoretical resources, flexibility, concern for the aggregate public good, and accountability to a wide constituency, are in the best position to craft effective punishment” and citizen suits replace career enforcers with narrowly focused members of the public “who have little appreciation of larger concerns that should inform a particular enforcement approach”).

34. Blomquist, *supra* note 33, at 370.

35. *Id.* at 409-10.

36. See Zinn, *supra* note 19 and accompanying discussion.

On a more fundamental level, commentators object that broad citizen participation in policing private and agency compliance violates the separation of powers and the provisions of Article II. These critics argue that permitting any citizen to bring enforcement and APA review actions without suffering an individual injury would confer on citizens the prosecutorial authority that is the sole province of the executive branch. Conferring a right upon citizens to prosecute violations of the law or agency failure to enforce the law would undermine the executive branch's exclusive purview over execution of the laws.³⁷ These critics argue that the Take Care Clause gives the executive branch the prerogative to enforce the law in the name of the public by analogizing to actions to vindicate public interest in regulatory enforcement to a nationwide class action. Because the executive branch is vested with the responsibility of enforcing the law on behalf of the public, these commentators argue that it is unconstitutional for individual citizens to do so.

This criticism is flawed. Vesting the executive branch with the prerogative of enforcing the law on behalf of the public does not entitle the executive branch to choose not to do so.³⁸ Citizen participation does not disrupt the executive branch's authority or responsibility to enforce the law. Rather, citizen suit plaintiffs may only intervene in instances when the executive branch has expressly opted not to enforce: these plaintiffs must show that the executive branch has not already taken action. Moreover, the executive branch always has notice and the opportunity to intervene once a citizen suit is filed.

Critics' second constitutional argument is that the courts that adjudicate suits brought by citizens without a concrete individual interest apart from the public's general interest in regulatory compliance permit suits that are not "cases" or "controversies" as required by Article III.³⁹ However, it is questionable whether actions based on the general public interest in regulatory enforcement are really contrary to the original understanding of Article III.

37. Harold J. Krent & Ethan G. Shenkman, *Of Citizens Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1794 & n.9 (1993) ("Article II prohibits Congress from vesting in private parties the power to bring enforcement actions on behalf of the public without allowing for sufficient executive control over the litigation. . . . [T]he Executive should redress unindividuated injuries because no single citizen should have any greater right than any other to vindicate injuries shared equally by the public as a whole. We believe that an analogy to a nationwide class action is apt only the Executive can be the class representative to vindicate the collective interests of the nation.").

38. Courts have long held that while charged with enforcement, the executive branch is not empowered to decline to enforce the law. The executive branch's duty to enforce the law does not encompass the authority to choose not to enforce it. This principle is implicit in the Court's invalidation of the Line Item Veto Act, which permitted the President to selectively decline to enforce the law would enable the President to amend or repeal an act of Congress in violation of Article I. *Clinton v. City of New York*, 524 U.S. 417 (1998). If Congress cannot *authorize* the executive branch to decline to execute portions of a law, then the executive branch certainly cannot decline to enforce the law against Congress's will.

39. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Charles S. Abell, Note, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 VA. L. REV. 1957, 1985 (1995) (discussing the difficulties of establishing an injury-in-fact without a direct interest in a violation).

There is substantial evidence that at the time of the framing, courts accepted jurisdiction over actions by members of the public to compel officers to perform their public duties, as well as *qui tam* actions or informers' suits. In 1875, the Supreme Court accepted jurisdiction over a suit brought by merchants pursuant to a statute granting the courts jurisdiction to hear suits seeking mandamus to compel railroad companies to operate as required by law. The Court observed that plaintiffs had "no interest other than such that belonged to others" and sought to enforce "a duty to the public generally," but "[t]here is, we think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a *mandamus* to enforce a public duty" ⁴⁰ Furthermore, as members of the first Congress, the Framers passed legislation providing for *qui tam* actions and included jurisdiction over them in the Judiciary Act of 1789. ⁴¹

Despite this evidence that suits to vindicate the general public interest are consistent with the original understanding of Article III, the currently accepted understanding of Article III requires litigants to have particular individualized interests in a controversy. Thus, critics of citizen participation lament citizen plaintiffs' lack of individualized interest in enforcing regulation against third parties as a violation of Article III. Justice Scalia has consistently argued against citizen participation via the courts, stating that "vindication of the rule of law—the undifferentiated public interest in faithful execution of the law" ⁴² is not the proper province of the citizen plaintiff, and that "courts need to accord greater weight than they have in recent times to the traditional requirement that the plaintiff's alleged injury be a particularized one, which sets him apart from the citizenry at large." ⁴³ However, whether a concrete individualized interest is (or should be) necessary for adjudication under Article III is of little consequence to my argument, since this Note argues that tradable rights satisfy an individualized interest requirement.

40. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 354-55 (1875) (citing *People ex rel. Case v. Collins*, 19 Wend. 56 (N.Y. Sup. Ct. 1837)) (articulating that where public rights are at stake, the people are the real party to the litigation, and every citizen has the right, if not the duty, to interfere and see that a public offense or grievance is remedied).

41. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774-78 (2000); Raoul Berger, *Standing To Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 817-819 (1969); Louis L. Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 635-36 (1971) [hereinafter Jaffe, *Standing Again*]; Louis L. Jaffe, *Standing To Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1270-71 (1961) [hereinafter Jaffe, *Standing To Secure*]; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1407-08, 1410 (1988) [hereinafter Winter, *The Metaphor of Standing*]; Steven L. Winter, *What If Justice Scalia Took the Rule of Law Seriously?*, 12 DUKE ENVTL. L. & POL'Y F. 155, 156 (2001) [hereinafter Winter, *Scalia*].

42. Winter, *Scalia*, *supra* note 41, at 157-58 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998)).

43. Scalia, *supra* note 39, at 881-82.

II. Standing Doctrine Limiting Citizen Participation

This Part provides background on how standing doctrine impedes plaintiffs seeking to enforce environmental regulation. A discussion of recent standing cases illustrates the obstacles faced by environmental plaintiffs and provides context for the latter part of this discussion on how holding tradable rights might avert barriers to standing.

There are two categories of standing requirements: constitutional and prudential. Constitutional standing requirements are justified as being necessary to ensure the litigation meets Article III's case-or-controversy requirement.⁴⁴ The Court maintains that in order for a court constitutionally to accept jurisdiction over a claim, the plaintiff must demonstrate that (1) he is threatened by an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent (rather than "conjectural" or "hypothetical"); (2) that the injury is fairly traceable to defendants' actions (causation); and (3) it is likely that the injury will be redressed by favorable decision (redressability). The second and third prongs are both encompassed by the term "causal nexus."⁴⁵ The Court has held that because these requirements are constitutional limits on courts' jurisdiction that Congress cannot waive, Congress may not grant a cause of action to plaintiffs who cannot meet these requirements.⁴⁶ Citizens seeking to bring citizen suits and APA review actions have faced difficulty establishing that (a) they have a concrete and particular interest in the resource; and (b) the regulatory failure with respect to a third party or the resource on aggregate will cause direct harm to *their* particular individualized interest.⁴⁷

Plaintiffs additionally face prudential standing requirements: "judicially self-imposed limits on the exercise of federal jurisdiction" that include "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."⁴⁸ Since these limitations are judicially constructed, and not constitutionally mandated, Congress may waive these requirements by granting a cause of action to

44. *Id.*

45. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (analyzing causation and redressability together).

46. *Id.* at 576-78.

47. See discussion *infra* notes 52-65 and accompanying text.

48. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982)). Here the "zone of interest" standard is articulated as a component of prudential standing requirements. It appears that after *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the zone of interests requirement was incorporated into prudential standing requirements, as opposed to being considered a separate statutory requirement under the APA specifically.

plaintiffs who do not satisfy them.⁴⁹ Hence they have less impact on citizen plaintiffs bringing suit based on a citizen suit provision or an APA cause of action. However, plaintiffs bringing suit under the APA must meet its statutory “zone of interests” requirement.⁵⁰

Plaintiffs bringing citizen enforcement or APA review actions have been inhibited mainly by constitutional standing requirements: they struggle to show that an agency’s failure to implement, or a third party’s failure to comply with, regulatory legislation is likely to cause harm to a specific portion of the resource in which they have a particular individualized interest.⁵¹ Two recent cases in which environmental plaintiffs sought review of agency action, *Lujan v. Defenders of Wildlife*⁵² and *Summers v. Earth Island Institute*,⁵³ illustrate this problem. These cases, coupled with the later discussion of tradable rights, illustrate the types of plaintiffs that may be able to obtain standing through tradable rights, though they would not otherwise meet standing requirements.

Lujan arose under the ESA’s requirement that the Department of the Interior issue Environmental Impact Statements before undertaking any project that may impact endangered species. The plaintiffs, members of a group called Defenders of Wildlife, studied endangered species in the impacted areas of Sri Lanka and Egypt. They sought review under the APA of the Department of the Interior’s determination that the ESA was inapplicable to projects outside the United States, and Interior’s failure to issue Environmental Impact Statements before undertaking development projects in Egypt and Sri Lanka that threatened the endangered species there. Though the plaintiffs had visited the habitats in the past and intended to return to the countries to study the habitats in the future, the Court struggled to see the plaintiffs’ individualized interests in the impacted habitats. Stating that the violation “must affect the plaintiff in a personal and individual way” apart from their “special interest in the subject,” the Court looked for tangible or concrete individual interests, suggesting standing requirements would likely be met if the Plaintiffs had actual plans, itineraries, or plane tickets to return to the areas, the value of which would be

49. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (noting that prudential standing requirements “can be modified or abrogated by Congress”); *Warth v. Seldon*, 422 U.S. 490, 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”).

50. Plaintiffs bringing APA review actions are required to demonstrate that their individual interests are “arguably within the zone of interests to be protected or regulated by the statute . . . in question.” *Bennett*, 520 U.S. at 163.

51. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Courts: Twenty Years of Law and Politics*, LAW & CONTEMP. PROBS., Autumn 1991, at 249; Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 299 (2008); Sunstein, *supra* note 5; see also *infra* notes 59-65 and accompanying text.

52. 504 U.S. 555 (1992).

53. 555 U.S. 488 (2009).

compromised if the endangered species they were travelling to see went extinct.⁵⁴ Absent these interests, the plaintiffs did not have standing to sue.

Proving causation and redressability tends to be particularly problematic where the plaintiff's claim rests on an agency's failure to regulate a third party. The *Lujan* court also captured the particular difficulties plaintiffs in citizen suits and APA review actions face in establishing a causal nexus:

When, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. . . . Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.⁵⁵

The *Lujan* plaintiffs also argued that they were entitled to sue under the ESA's citizen suit provision "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."⁵⁶ The Court held that ESA's citizen suit provision was unconstitutional as applied to *Lujan* because it purported to grant standing where plaintiffs did not meet the case-or-controversy requirement of Article III. It stated that a plaintiff must show more than "a generally available grievance about government claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large."⁵⁷ The Court emphasized that "[v]indicating the public interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive."⁵⁸

Following *Lujan*, the Court's decision in *Summers* enhanced the difficulty for environmental plaintiffs by rejecting "probabilistic standing" based on a "realistic likelihood" that a plaintiff's individual interest in the resource would be effected because the agency's actions threatened the resource on whole, even if it was not possible to identify which specific area or portion of the resource would be damaged.⁵⁹ The plaintiffs in *Summers*, an organization of

54. *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring in part and concurring in the judgment) ("[I]t may seem trivial to require that [plaintiffs] acquire airline tickets to the project sites or announce a date certain upon which they will return.").

55. *Id.* at 561-62.

56. 16 U.S.C. § 1540(g)(1) (2006).

57. *Lujan*, 504 U.S. at 573-74 (Scalia, J.).

58. *Id.* at 577. The trouble with Justice Scalia's deference to the democratic branches argument is that the citizen suit provisions were enacted to ensure that the will of the democratic majority was carried out. Invalidating the legislature's decision to allow for citizen suits seems to be ironically invalidating a democratic decision of the legislature in the name of deference to the democratically elected branches.

59. *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). See Bradford Mank, *Summers v. Earth Island Institute Rejects Probabilistic Standing, But a 'Realistic Threat' of Harm Is a Better Standing Test*, 40 ENV. L. 89 (2010); William Funk, "Probabilistic Injury": *The Odds Aren't Good*,

frequent National Forest visitors, claimed that the U.S. Forest Service was violating and effectively repealing a statute requiring it to provide for public notice, comment, and appeal, on upcoming projects by determining that the notice requirement did not apply to projects involving less than two hundred fifty acres, then undertaking a majority of its projects in increments of less than two hundred fifty acres. Though the Court acknowledged that the agency's action may be illegal and harmful to the forest on whole, it found that none of the forest-frequenting plaintiffs were able to prove that the U.S. Forest Service was about to destroy a specific part of the forest that they had concrete plans to use, and therefore could not establish that they were facing imminent threat to their individualized interest.⁶⁰ Justice Breyer's dissent argued that a plaintiff who had visited seventy National Forests hundreds of times, and who would continue doing so, should have standing based on probabilistic injury—a "threat of future harm [that] may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates."⁶¹ Rejecting this notion of standing based on a high probability of injury, the *Summers* majority explained that it would not assume that a plaintiff would

stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have [used the public comment and objection process and] commented on the project but for the regulation,⁶²

implying that a plaintiff would have to prove as much. *Summers* created a Catch-22 whereby the U.S. Forest Service's illegal actions (failing to provide notice about upcoming projects) perpetually precluded plaintiffs from having standing to challenge those actions. Since the U.S. Forest Service did not provide notice of future projects, it was nearly impossible to identify particular tracts of forest that were about to be impacted, or, consequently, to identify an individual plaintiff with an interest in a specific tract that was threatened.

This *Summers* problem—rejection of probabilistic injury—potentially thwarted suits challenging MMS's notorious failure to regulate oil rigs in the Gulf of Mexico before the 2010 oil spill occurred. It would have likely been possible to establish that the Gulf on whole faced the imminent threat of an oil spill because the 1979 Ixtoc oil spill in Mexico's Bay of Campeche was caused in exactly the same way: by MMS permitting a drilling rig without verifying

JOTWELL (May 10, 2010), <http://adlaw.jotwell.com/probabilistic-injury-the-odds-arent-good> ("The problem according to the [*Summers*] majority was that there was no particular identified member for whom it could be said that he would indeed have his recreational enjoyment destroyed by such a timber sale. The dissent argued that there was a realistic likelihood that one or more members of the organizations would in fact have their recreational enjoyment destroyed by a such a sale, even if the particular member or members could not be identified at this time.")

60. *Summers*, 555 U.S. at 492-97.

61. *Id.* at 506 (Breyer, J., dissenting).

62. *Id.* at 496 (Scalia, J.).

the adequacy of the rig's blowout prevention mechanisms.⁶³ It was also known that MMS had permitted a number of rigs to operate without verifying the adequacy of blowout preventers,⁶⁴ and the danger of this was established by the Mexico Bay spill. Hence, there was a demonstrable likelihood that the Gulf was threatened by an imminent oil spill—seemingly sufficient to bestow standing on individuals living around and frequently using the Gulf under the notion of probabilistic injury articulated in Justice Breyer's *Summers* dissent. However, it would have been immensely difficult to identify an individual plaintiff that could obtain standing under *Summers* requirements because it would be very hard to establish which particular individual's interest would be impacted specifically, given the broad area that could potentially be impacted by an oil spill. It would be very difficult to identify one specific physical area, tract of land, or fish population, that was threatened; and it therefore would not be possible to identify a plaintiff who had a particular individual interest in it.⁶⁵

These cases illustrate how plaintiffs suing to enforce compliance with environmental protection legislation, based on causes of action in the APA or citizen suit provisions, face difficulty meeting Article III standing requirements of showing that they have a concrete, particularized, individual interest, and that there is a causal nexus between the challenged action and their particular interest.

Plaintiffs in APA review proceedings, in addition to establishing Article III standing, must also meet the statutory/prudential requirement that their concrete interests “fall[] within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.”⁶⁶ The “zone of interests” test is not intended to be “especially demanding” and allows a plaintiff to seek review of agency action even if there is “no indication of congressional purpose to benefit the would-be plaintiff.”⁶⁷ Nonetheless, for standing under the APA, a plaintiff must establish that Congress intended for his interests to be *considered* or *relevant* in implementation of the statute:

[W]here the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.⁶⁸

63. *Gulf Deep Water Oil Drilling Challenged*, EARTHJUSTICE (June 9, 2011), <http://earthjustice.org/news/press/2011/gulf-deep-water-oil-drilling-challenged>; *Oil Spill Q & A with Earthjustice Attorney David Guest*, *supra* note 13.

64. See *supra* notes 12-14 and accompanying text.

65. Mank, *supra* note 59 (discussing how *Summers*'s rejection of probabilistic standing may extend to cases, as with the release of toxic chemicals, in which it is impossible to prove which specific individuals will be harmed without relying on statistical likelihood of injury); Funk, *supra* note 59.

66. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 176 (1970).

67. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987).

68. *Id.* at 399.

Plaintiffs seeking to employ regulations designed to protect environmental or animal welfare have been barred by holdings that their interests are not within the zone of interests contemplated by the statute. For instance, the District of Columbia Circuit Court has held that an animal welfare organization fell outside of the “zone of interests” protected by the Federal Laboratory Animal Welfare Act and therefore did not have standing to challenge a regulation adopted thereunder by the Department of Agriculture.⁶⁹ Insofar as courts have recognized plaintiffs as being within the “zone of interests” of animal and environmental welfare legislation, they have done so only when plaintiffs themselves show an interest in not seeing animals suffer that is obviously related to legislation promoting animal welfare.⁷⁰ Courts have also narrowed the “zone of interests” of the National Environmental Policy Act (NEPA). In these cases, courts have found plaintiffs with only a financial or professional interest in compliance with environmental policies prescribed by the act are not within the “zone of interests” protected by the legislation.⁷¹ This has restricted plaintiffs who have attempted to rely on financial interests, of which courts have typically been more accepting,⁷² to meet standing requirements from suing to enforce agency compliance with environmental procedures.

Some have argued that the Court’s 2007 decision granting standing to the State of Massachusetts to challenge the EPA’s failure to regulate greenhouse gas emissions indicates a liberalization in standing doctrine for environmental plaintiffs.⁷³ During this past Term in *American Electric Power Co. v. Connecticut* (*AEP*), four members of an equally divided Court announced they

69. Animal Legal Def. Fund, Inc. v. Espy, 23 F.3d 496, 501-02 (D.C. Cir. 1994).

70. Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 444 (D.C. Cir. 1998) (holding that the plaintiff who frequented an animal exhibition was within the “zone of interests” to challenge regulations governing the animals’ care because “[t]he very purpose of animal exhibitions is, necessarily, to entertain and educate people; exhibitions make no sense unless one takes the interests of their human visitors into account”).

71. See *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (“We have long described the zone of interests that NEPA protects as being environmental. Accordingly, we have consistently held that purely economic interests do not fall within NEPA’s zone of interests.”) (citations omitted); *Cent. S.D. Co-op. Grazing Dist. v. Sec’y of U.S. Dept. of Agric.*, 266 F.3d 889, 895-96 (8th Cir. 2001) (“Economic interests alone are ‘clearly not within the zone of interests to be protected by [NEPA].’”) (quoting *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976)); *Nev. Land Action Ass’n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (“The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions [A] plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.”).

72. See, e.g., *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. at 154 (basing standing on plaintiffs’ financial interests).

73. *Massachusetts v. EPA*, 549 U.S. 497 (2007); Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 93 VA. L. REV. IN BRIEF 63, 69-70 (2007), available at <http://www.virginialawreview.org/inbrief/2007/05/21/adler>; Michael J. Ritter, Note, *Standing in the Way of Animal Welfare: A Reconsideration of the Zone-of-Interest “Gloss” on the Administrative Procedures Act*, 29 REV. LITIG. 951 (2010).

would grant standing to the State of Connecticut, seven other States, and the City of New York to seek an injunction restricting power plants' greenhouse gas emissions.⁷⁴ This opinion could also be seen as representative of this trend. However, the standing analysis of these cases seems not to be a general departure from or liberalization of previous standing doctrine, but rather a distinct exception for states bringing suits as on behalf of their citizens as *parens patriae*. This develops a unique exception to the concrete and particular individual interest requirement based on the states' "quasi-sovereign interests" in protecting their natural resources and the public welfare, both of which are distinct from the interests of private parties. Accordingly, states have an "individual" interest in the environmental wellbeing of all of their territory and do not need to pinpoint a specific physical tract of land that is imminently threatened.⁷⁵ Hence, these cases likely have little bearing on standing for the citizen plaintiff in citizen enforcement and APA review actions. This is illustrated by *Summers*, which occurred two years after *Massachusetts v. EPA*, and, as discussed above, enforced standing requirements as stringent as *Lujan*'s and rejected probabilistic standing, which raised barriers to standing for citizen plaintiffs. Since *Summers* occurred between the *Massachusetts* and *AEP* decisions and made standing more difficult for individual citizen plaintiffs, *AEP* must be understood as relying particularly on the state standing context.⁷⁶ There is no indication in the *AEP* decision or otherwise that standing requirements have been eased for citizen plaintiffs.

This discussion has illustrated how standing requirements have thwarted citizen plaintiffs from participating in enforcement and oversight of environmental regulation, despite Congress providing for their participation.

74. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2536 (2011); Nancy G. Millburn, *Connecticut v. AEP Decision*, COLUM. J. ENVT'L L., Apr. 12, 2009, <http://www.columbiaenvironmentallaw.org/articles/connecticut-v-aep-decision> (discussing the Second Circuit's decision in favor of plaintiffs' standing as a relaxation of standing requirements).

75. Both *Massachusetts v. EPA* and *AEP v. Connecticut* relied on this *parens patriae* theory rather than a concrete individualized interest and can be seen as development of a distinct doctrine with respect to states' standing. For further discussion, see Bradford Mank, *Should States Have Greater Standing Rights than Ordinary Citizens?: Massachusetts v. E.P.A.'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008); Dru Stevenson, *Special Solitude for State Standing: Massachusetts v. EPA*, 112 PENN ST. L. REV. 1, 2 (2007); and Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029 (2008).

76. If any liberalization in access to courts for citizen plaintiffs resulted from the *AEP* decision, it is not in terms of the standing requirements for citizen plaintiffs, but in the determination that state common-law nuisance claims may not be precluded by federal regulation. This implies that enabling a plaintiff to meet standing requirements based on tradable rights might enable him to bring a state common law nuisance claim against a private violator of environmental legislation, assuming the plaintiffs could meet the elements of a common law nuisance claim (for instance, harming health or interfering with enjoyment, impacting substantial numbers of people, or causing annoyance to the average reasonable citizen). Because of the difficulty in meeting the elements of a common-law nuisance claim based on an imminent environmental threat, and because remedies are restricted to injunctions, the impact of potentially enabling state law nuisance claims should be minimal, and there is virtually no "floodgates risk" for the reasons discussed in the conclusion.

The discussion below outlines programs that create private rights in environmental resources, and argues that these programs confer upon holders a private, concrete, and individual interest that is directly and tangibly connected to the overall abundance of a resource. Holding such a share might avoid the *Summers* problem by automatically establishing individualized injury, causation, and redressability when a regulatory action threatens to impact the overall abundance of the underlying resource. Furthermore, tradable rights holders are necessarily within the “zone of interests” contemplated by legislation regulating the underlying resource.

III. Environmental Resource Privatization Programs: Concrete Individual Interest in Enforcement of Environmental Protection Legislation

Before considering how Tradable-rights programs may impact a plaintiff’s standing, it is helpful to first review the theory behind Tradable-rights programs as well as the structure and objectives of the programs. Commentators lamenting shortcomings in environmental protection efforts have focused on the relationship between the absence of private property interests and mismanagement of environmental resources.⁷⁷ Since Hardin’s *Tragedy of the Commons* in the 1960s, these commentators have observed that without private ownership, users tend to undervalue and underinvest in conservation, regulation, and management, of common resources because they do not bear the full costs of overusing and devaluing those resources.⁷⁸ If a number of private entities uses a common resource, no user internalizes the cost of depleting it or has incentive to encourage optimal management either by conserving usage itself or supporting use regulations. Creating property rights to require users to hold a private stake in the value of the common resource counteracts this problem by forcing users to internalize the cost of depletion, thus incentivizing optimal management, conservation, and enforcement of regulations over those resources.⁷⁹ Private property regimes in common

77. Ackerman & Stewart, *supra* note 9; Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968); Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 HARV. ENVTL. L. REV. 503, 555-56 (2008).

78. Daniel H. Cole, *Clearing the Air: Four Propositions About Property Rights and Environmental Protection*, 10 DUKE ENVTL. L. & POL’Y F. 103, 106 (1999); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967); Hardin, *supra* note 77.

79. Ackerman & Stewart, *supra* note 9, at 1341-42 (“[A]llowing polluters to buy and sell each other’s permits—thereby creating a powerful financial incentive for those who can clean up most cheaply to sell their permits to those whose treatment costs are highest . . . will tend to bring about a least-cost allocation of control burdens, . . . provide positive economic rewards for polluters who develop environmentally superior products and processes. . . , and facilitate more intelligent setting of priorities.”); Hardin, *supra* note 77; Laitos & Gamble, *supra* note 77, at 555-56; Anthony C. Scott, *The Fishery: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116 (1955). This is not to argue that tradable rights programs are always a superior or ideal means for resource management. See, e.g., David M. Uhlmann, *Combating Global Climate Change: Why a Carbon Tax Is a Better Response to Global Warming than Cap and Trade*, 28 STAN. ENVTL. L.J. 3 (2009) (arguing that a carbon tax would be easier to implement, more effective, and less risky than a tradable carbon emissions system); Daniel H. Cole &

resources have three particular advantages over command and control regulation: (a) they provide incentives to consume the resource at optimal levels for the long term preservation of value, thereby discouraging short term over-use; (b) they provide incentives to invest in preserving and maintaining the resource; and (c) they promote a greater sense of stewardship of the resource among those with rights to it, encouraging them to participate in and enforce management decisions.⁸⁰

For instance, in the context of individual fishing quotas, unrestricted quota trading is thought to promote economic efficiency in the fisheries because those willing to pay the highest price for a quota would be those expected to use that quota most profitably by catching fish at a lower cost or transforming the fish into a more valuable product. Over time, unrestricted trading should lead less efficient fishermen to either improve their efficiency or sell their quotas. Furthermore, the cap on each party's overall catch stifles costly overinvestment, or a race to the bottom, among fishing fleets, since the total shares of each fleet and its competitors are capped, and there is no economic incentive to overinvest in competitive technology for the purpose of beating competitors to catching the available fish. Fishing fleets need not race to catch the most fish the quickest because they will be guaranteed the value of a given volume of fish that year, either by fishing their permitted share or choosing to sell their rights to their more efficient competitors.⁸¹

Programs granting private tradable rights in environmental resources have been an increasingly prominent means of supplementing command and control regulation of public resources. Tradable-rights programs have been implemented or proposed for a range of common resources, including

Peter Z. Grossman, *When Is Command-and-Control Efficient? Intuitions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WISC. L. REV. 887 (discussing the inaccuracy of the "prevailing view" that command-and-control regulation is less efficient than alternative economic instruments such as effluent taxes and marketable permits). Whether tradable rights regimes are the best regulatory alternative is likely to vary depending on the subject, the industry, the economy, and the conservational requirements or objectives. I do not argue that tradable rights represent a categorically preferable regulatory regime for promoting environmental conservation. Rather, this discussion only aims to establish that tradable rights programs are popular enough among policymakers and legislators to have been enacted and implemented successfully, and to consider other potential legal uses and implications for these mechanisms. Since it appears as though tradable rights programs are currently an established feature of our regulatory regime, and new ones are being proposed, my aim is only to evaluate how they relate to other features of regulation and litigation.

80. See Ackerman & Stewart, *supra* note 9; Laitos & Gambel, *supra* note 77; Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 159 (2005) ("[T]here are indications that fishers who own individual transferable quotas may be more committed 'to the long-term sustainability of their stocks', less likely to seek increases in the overall catch that is allowed, and more willing to invest in 'local cooperation and voluntary controls.'") (quoting Suzi Kerr, Richard Newell & James Sanchirico, *Evaluating the New Zealand Individual Transferable Quota Market for Fisheries Management* 15-17 (Motu Econ. & Pub. Pol'y Research Trust, Working Paper No. 2003-02, 2003), available at http://motu-www.motu.org.nz/wpapers/03_02.pdf); James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Tradable Rights Programs*, 6 YALE J. ON REG. 369, 378 (1989); Scott, *supra* note 79.

81. See Wyman, *supra* note 80.

individual transferable quotas in fisheries, marketable pollution permits or allowances, tradable development rights, habitat conservation rights, and transferable grazing rights.⁸²

Tradable-rights programs operate by establishing resource conservation or management objectives and placing an overall ceiling on the amount of the resource that may be depleted. This ceiling is periodically determined in accordance with the resource's overall abundance or scarcity. Based on this aggregate ceiling administrators determine the number of rights available to deplete the resource and periodically adjust the volume of resource depletion permitted per each unit of tradable right. For instance, one quota share of fishing rights may permit the holder to catch 1000 pounds of fish this year, but an administrator may adjust that same quota share to permit only 800 pounds the next year based on changes in the aggregate ceiling—depending on the overall fish population. The resource rights and the amount of resource use permitted per right are necessarily scarce, as they must reflect the resource's scarcity and limit the number of possible purchasers in order to maintain monetary value and encourage efficient use. Entities wishing to consume or deplete the resource must purchase units for the entire volume of the resource they consume. If an entity uses less of the resource than it is entitled to use, it may sell the surplus rights to another.⁸³

Hence, tradable rights establish a direct and tangible connection between the aggregate abundance or availability of the resource and the value of the owner's individual share, quota, or permit. Because the resource's aggregate abundance determines the amount of resource depletion *permitted* per tradable right unit, and because users must purchase rights to access the resource, everyone using a resource shares the market for its tradable rights. Each rights holder's individual interest is impacted by any action that threatens the resource's overall availability, even if they are unable to establish a threat to the specific portion of the resource they use. As the resource's availability diminishes, the volume of resource depletion permitted per tradable right unit is decreased, and the value of each tradable share is reduced for every tradable-rights owner.

Tradable-rights holders have several different types of interests in the underlying resource, depending on the nature and purpose of their ownership, and to some extent the resource-privatization program involved. First, and most plainly, every rights holder has an interest in enforcement of, and compliance with, the quota or permit requirements among all other resource users.

82. David Sohn & Madeline Cohen, *From Smokestacks to Species: Extending the Tradable Permit Approach from Air Pollution to Habitat Conservation*, 15 STAN. ENVTL. L.J. 405, 410 (1996); Thomas Sterner, *Tradable Permits*, in POLICY INSTRUMENTS FOR ENVIRONMENTAL AND NATURAL RESOURCE MANAGEMENT 82 (Thomas Sterner ed., 2002); Tripp & Dudek, *supra* note 80.

83. Sohn & Cohen, *supra* note 82, at 411.

Commentators have observed this, arguing that tradable rights incentivize all holders to support enforcement of the quota and use restrictions:

The marketable permit system would also provide much stronger incentives for effective monitoring and enforcement. If [rights holders] did not expect rigorous enforcement during the term of their permits, this fact would show up at the auction in dramatically lower bids: Why pay a lot for the right to [deplete the resource] legally when one can [deplete it] illegally without serious risk of detection? . . . Moreover, permit holders may themselves support strong enforcement in order to ensure that cheating by others does not depreciate the value of the permit holders' investments.⁸⁴

Second, beyond concrete financial interest in enforcement of the quota program itself, those holding quotas for the purpose of using the resource have an interest in the resource's overall abundance. Administrators periodically adjust the volume of resource depletion permitted for each quota unit in accordance with the aggregate availability of the resource. Any action that threatens aggregate resource availability threatens to reduce the volume of resource use permitted or represented by each quota unit. A quota holder who intends to use the resource is able to consume less of the resource per their quotas whenever aggregate abundance of the resource decreases and the volume of use permitted per quota share is reduced accordingly.

Third and alternatively, those holding rights for investment or resale—not intending to use the resource—have an interest in ensuring use rights remain scarce and valuable, and that the aggregate ceiling of resource use and volume of use permitted per each quota share is adequately adjusted in accordance with the resource's overall scarcity, and that the aggregate ceiling on resource use is enforced. These holders have a concrete interest in ensuring that rights to use each unit of the resource do indeed become more scarce (and costly) as the resource becomes less abundant.⁸⁵

IV. Standing Based on Tradable Rights

A. *Establishing Concrete and Particularized Individual Interest*

Tradable rights confer interests on holders akin to two types of concrete private interests that have consistently been found sufficient individual interests for standing: a property interest and an interest in a share of a market. Though the exact nature of the private interest created by Tradable-rights programs is somewhat undefined, rights holders have a concrete private interest whose value is directly linked to the aggregate availability of the resource and

84. Ackerman & Stewart, *supra* note 9, at 1346 & n.32.

85. *Clean Air Act Amendments Conference Report*, 136 CONG. REC. S16,980 (daily ed. Oct. 27, 1990) (Statement of Sen. Max Baucus) ("[T]he allowance system is designed so that the allowances will be treated in part like economic commodities Allowance holders should expect that allowances will partake of durable economic value and that commercial and other relevant law will apply to allowances and function to protect that value.").

dependent on the market for rights to use the resource. This suggests that whether or not they are regarded as absolute property rights, tradable rights in a resource do confer a concrete and particular individual interest in actions impacting the aggregate availability of the resource and the market for resource rights that is sufficient for standing.

1. Standing Based on a Property Interest

a. Are Tradable Rights Property?

There is a compelling argument that tradable environmental resource rights create property rights, and therefore would presumptively confer holders' standing.⁸⁶ It is well established that property has a range of attributes, commonly referred to as a bundle of sticks and the definition of property may depend on the context or purpose for which it is defined. Tradable rights have attributes that the Court has consistently recognized are fundamental elements of property. The Court has emphasized that "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating to the whole domain of social and economic fact."⁸⁷ Tradable rights have many more of the concrete characteristics of property than many of the abstract, intangible statutory entitlements that the Court has recognized constitutionally protected property interests in,⁸⁸ such as a driver's license or a horse trainer's license.⁸⁹

Despite their essential property characteristics, legislatures have been reluctant to classify tradable rights as property because they want to preserve

86. Some commentators suggest that the Court has been more willing to grant standing when the plaintiffs assert a property interest at stake than when they assert allegations of environmental harm. See, e.g., Bradford Mank, *Standing in Monsanto Co. v. Geertson Seed Farms: Using Economic Injury as a Basis for Standing When Environmental Harm Is Difficult To Prove*, 115 PENN. ST. L. REV. 307, 309 (2010) (explaining that Justice Scalia has been skeptical of standing based on threats of environmental harm but has been more willing to grant standing if the plaintiffs allege property loss from threatened environmental injury); Maxwell L. Stearns, *From Lujan to Laidlaw: A Preliminary Model of Environmental Standing*, 11 DUKE ENVTL. L. & POL'Y F. 321, 383-386 (2001) (theorizing that environmental plaintiffs have obtained standing when their alleged injury was a decline in property values independent of the threatened environmental harm, and that the *Lujan* plaintiffs would have obtained standing if they alleged similar threat to property value).

87. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (citations omitted) (finding a property interest in the right to adjudicatory procedures prescribed by the Fair Employment Practices Act). Observing that four of the Supreme Court's recent decisions relied on different and unrelated definitions of property in different contexts, Merrill suggests a "pattern definition" of property whereby the definition of property for substantive constitutional protection under the Due Process Clause or Takings Clause may differ from the definition of property for other purposes. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

88. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) ("[P]rotection of 'property' . . . has been read broadly to extend protection to any 'significant property interest,' including statutory entitlements.") (citations omitted).

89. *Logan*, 455 U.S. at 430-31; *Barry v. Barchi*, 443 U.S. 55, 62-63 (1979).

authority to alter the rights or the volume of resource use permitted per rights unit without qualifying as a “taking” of private property under the Takings Clause of the Constitution.⁹⁰ However, tradable rights necessarily have many definitive characteristics of private property to provide the incentives they are designed to achieve. As one commentator observed, “[t]hey are individual allotments that are exclusive, durable, and alienable. Indeed, there is even a registry of individual transferable quotas for recording security interests against them, reminiscent of the registries of traditional property rights in land.”⁹¹ In order to preserve the value, the holder must be able to maintain or sell the right at will and have a high degree of certainty that the right will not be withdrawn or alienated without compensation. Hence commentators consistently treat tradable rights as property, categorizing them as a private-property-based solution to the tragedy of the commons;⁹² and courts have discussed them in property terms, describing holders of such interests as having “title” to allowances.⁹³ Even a legislative report rejecting these allowances as property rights for the purposes of the Takings Clause elaborated on the crucial property-like characteristics of tradable rights and discussed the rights in property terms:

[T]o exploit the efficiencies afforded by the allowance system, parties will transfer them between and among themselves pursuant to a wide variety of commercial arrangements. Ownership of allowances by brokers, investors and other market makers will maintain fluidity in the allowance market, link ultimate utility buyers with original sellers and facilitate rational price-finding The Administrator should assure that transfers become effective as quickly as possible with minimal burdens on the parties to the transfer No unit should be legally entitled to avoid its emissions limitation obligations under this title by claiming possession of allowances held, and applied to compliance, by another source. . . . allowance holders should expect that allowances will partake of durable economic value and that commercial antitrust and other relevant law will apply to allowances and function to protect that value.⁹⁴

90. *Clean Air Act Amendments Conference Report*, *supra* note 85 (“[T]he reason for characterizing the legal or property status of allowances in this title is to make clear that regulatory actions taken subsequent to the issuance of allowances are not subject to the ‘takings clause’ of the U.S. Constitution.”); Henry E. Mazurek, Jr., *The Future of Clean Air: The Application of Futures Markets to Title IV of the 1990 Amendments to the Clean Air Act*, 13 TEMP. ENVTL. L. & TECH. J. 1, 23 & n.181 (1994) (explaining that the 1990 amendments to the Clean Air Act specify that emissions allowances do not constitute property rights, and that the Senate conference report specified that allowances are not protected property under the takings clause); Wyman, *supra* note 80, at 163 (“There is considerable reluctance to characterize [emissions allowances] as [property rights] for fear of attracting takings liability should it become necessary to reduce the value of the rights.”).

91. Wyman, *supra* note 80, at 163-64.

92. See, e.g., Laitos & Gamble, *supra* note 77, at 560-61 (“Markets will not function at all, and they will certainly not function efficiently, if property rights to the market’s goods are either non-existent or uncertain [T]radable environmental property rights . . . have been proposed or implemented for fisheries, the atmosphere, and other natural resource commons.”); Mazurek, *supra* note 90, at 10-11; Wyman, *supra* note 80, at 155-56.

93. *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996) (“For allowances to ‘be treated like economic commodities,’ their nature and those entitled to an interest in them must be uniformly established throughout the market.”) (quoting S. REP. NO. 101-228, at 321 (1990)).

94. S. REP. NO. 101-228, at 320-21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3704.

A House Energy and Commerce Committee report issued during final debate over the proposed Amendments described allowances as being “quasi-property.” Congress further emphasized the durable nature of an “allowance” by granting “only Congress and the President, acting together through legislation, the authority to limit or revoke allowances.”⁹⁵

Tradable-rights programs define the allowances much more in terms of personal concrete value, alienability, and rights, to hold and to exclude than the abstract entitlements, such as a license, that the Court has recognized as property interests. Furthermore, tradable-rights holders can buy and sell rights on an independent secondary market, formally register security interests against tradable rights they own, and rely on the value of rights in the future.⁹⁶ This all suggests that tradable rights confer a judicially cognizable property interest.

b. Property Interests and Standing

Jurisprudence regarding standing based on a property interest suggests that if tradable rights are considered rights akin to property rights, holders would presumptively meet the standing requirements for litigation involving the underlying resource. This is because courts generally consider a property interest to establish automatically the requisite individual interest for standing, and causation and redressibility requirements are also relaxed when an individual can demonstrate a property interest at stake. Commentators addressing the Court’s standing jurisprudence in environmental cases have observed this, noting, for instance, that Justice Scalia has been “willing to consider the possibility that an environmental plaintiff could establish standing without proof of environmental injury if he or she could show property loss from a threatened environmental injury” even though he rejected the same plaintiff’s “‘reasonable concerns’ about a threatened environmental injury as insufficient for standing.”⁹⁷

Recently, the majority (including Justice Scalia) in *Monsanto Co. v. Geertson Seed Farms*⁹⁸ granted standing to farmers challenging the sale of genetically modified seeds based on the threat to their property interests—the preventative measures they needed to undertake due to the threat of cross-

95. Mazurek, *supra* note 90, at 11 (citing H.R. REP. NO. 101-490, at 366 (1990); 136 CONG. REC. E360, E3672 (daily ed. Nov. 2, 1990)).

96. The Court lent support to the property-like nature of transferable development rights by finding that the zoning restrictions prohibiting owners of Grand Central Station from building upwards did not constitute an uncompensated taking because the owners were effectively compensated for the restriction with surplus transferable development rights, which they could sell to surrounding developments—thus implying that tradable rights can themselves constitute compensation for Takings Clause purposes. *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978) (“[R]ights to develop airspace are made transferable to at least eight parcels in the vicinity of the Terminal [T]he rights afforded are valuable. [They] undoubtedly mitigate whatever financial burdens the law has imposed on appellants . . .”).

97. Mank, *supra* note 86, at 310.

98. 130 S. Ct. 2743 (2010).

contamination. They majority did so despite skepticism about whether the farmers could prove that their own farms were specifically facing an imminent risk of cross-contamination. *Monsanto*, it is argued, can be understood as establishing standing for “environmental plaintiffs who can make a plausible showing of economic injury even in cases where it may be difficult to prove an actual environmental harm to plaintiffs.”⁹⁹

Furthermore, the Court has recognized standing for *qui tam* plaintiffs who bring informer or whistleblower suits, and who do not have a particular individual interest in the violation in question, because those plaintiffs are partial-assignees of the Government’s property interest in the claim.¹⁰⁰ Lower courts have captured how property interests presumptively confer an owner’s standing, explaining that “ownership or possession of property may provide evidence of standing, and in some circumstances act as, in effect, a surrogate for an inquiry into whether there is injury direct enough and sufficient enough to sustain standing.”¹⁰¹ Another court explained that where a “statute . . . provides an independent state law source of the plaintiff’s property interest . . . plaintiff has a property interest at stake sufficient to give her standing to prosecute this action.”¹⁰² Plaintiffs with property interests also face less of a burden of establishing the particular harm that is likely to result from regulatory failure. One court has held that “when the premises that are the subject of an administrative agency’s action are a party’s property or are in close proximity to a party’s property, . . . that party may be presumed to be adversely affected by a[n] [environmental protection law] violation and need not allege a specific harm.”¹⁰³ *Monsanto* can also be understood as supporting this proposition: the plaintiff farmers might not have been able to establish cross-contamination of their own farms was imminent, but it was sufficient that they were forced to take measures protect their property from this treat.

Courts have also found the extent of, or lack of, a property interest to be dispositive with respect to standing determinations and have found that plaintiffs do not have standing because it has not shown that “the impacts of the

99. Mank, *supra* note 86, at 310.

100. *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 774 (2000) (noting that the Framers, as members of the first Congress, passed legislation providing for *qui tam* actions and included jurisdiction over them in the Judiciary Act of 1789); *see also* Shay S. Scott, *Combining Environmental Citizen Suits & Other Private Theories of Recovery*, 8 J. ENVTL. L. & LITIG. 369, 385-86 (1993) (“Where a plaintiff suffers personal injuries, physical harm to real estate, or harm to personal property, courts have generally regarded these injuries as sufficiently ‘different in kind’ from the injuries suffered by the general public.”)

101. *United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d 103, 116 (E.D.N.Y. 2007) (quoting *United States v. Cambio Exacto*, 166 F.3d 522, 526-27 (2d Cir. 1999)).

102. *Beauchesne v. Nimmo*, 562 F. Supp. 250, 254 (D. Conn. 1983).

103. *White Plains Downtown Dist. Mgmt. Ass’n, Inc. v. Spano*, 833 N.Y.S. 2d 868, 872 (Sup. Ct. 2007) (internal citations omitted).

[illegal action] will affect its property interests.”¹⁰⁴ Decisions suggest that courts often consider parties’ standing to sue to be coterminous with their property rights in the affected resource.¹⁰⁵ If tradable rights are construed as property rights, these cases suggest that a plaintiff holding tradable rights would have a greatly increased likelihood of meeting the concrete and particularized individual interest requirement in any litigation involving the underlying resource.

While possession of a property interest is generally regarded as sufficient evidence of individual injury establishing a plaintiff’s standing to sue, it is not necessary. The interests sufficient for standing are more expansive than property interests. “Ownership . . . is only evidence of direct injury and an individual who does not own the property at issue can still possess constitutional standing”¹⁰⁶ While a property interest implies that the holder has standing, interests less concrete than absolute property rights may also be sufficient bases for standing. Next I will show that even if tradable rights are not construed as property interests, they should nonetheless establish holders’ standing because they are analogous to concrete financial interests in a share of a market that courts have consistently considered sufficient for standing.

2. Standing Based on Market Interest

Tradable rights to environmental resources establish a holder’s concrete interest in the market for the resource right. This interest is analogous to market share interests that courts have found sufficient to confer standing. Courts have consistently recognized that where an agency’s action benefits someone with whom the plaintiff competes in a market, the plaintiff has the requisite individual interest for standing to challenge that agency action.¹⁰⁷

Indeed, the Court introduced the concrete individual interest standard in order to recognize this type of standing in *Data Processing*.¹⁰⁸ The plaintiffs

104. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938-39 (9th Cir. 2001). The Ninth Circuit also held that two clients had standing to challenge a program that confiscated the interest earned on their lawyer’s trust accounts because they had a property interest at stake, but the lawyer whose clients’ interest was confiscated was “[w]ithout the requisite property right, [and thus] lacks standing to challenge the IOLTA program.” *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 847-48 (9th Cir. 2001).

105. *Oklahoma v. Tyson Foods, Inc.*, 258 F.R.D. 472, 483 (N.D. Okla. 2009) (“A plaintiff does not have standing to assert a claim of injury to property it does not own or hold in trust. Although the [plaintiff] has standing to assert its claims relative to its own rights in the [Illinois River Watershed], it has no standing . . . to seek damages for injury to [other] lands and natural resources.”) (quoting *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006)).

106. *United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d 103, 117 (E.D.N.Y. 2007); *see also Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) (“That the litigant’s interest must be greater than that of the public at large does not imply that the interest must be a substantive right sounding in property or contract.”).

107. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

108. *Id.* at 153 (explaining that the Court’s previous standing decisions required the plaintiff show that “the right invaded is a legal right—one of property, one arising out of contract, one protected

sold data processing services, and the Comptroller of the Currency interpreted the Bank Service Corporation Act to allow banks to sell data processing services, increasing competition in the market for data processing services. The data processing companies argued that the Comptroller allowed national banks to compete illegally in the data processing services market, thereby increasing competition in the market and diminishing their market share. The Court recognized that even though the statute in question—governing regulation of national banks—did not confer any legal rights directly on the plaintiff data processing companies, the plaintiffs’ interest in a share of the data processing market was a sufficiently concrete individual interest for standing. The Court reasoned that “certainly, he who is ‘likely to be financially’ injured may be a reliable private attorney general to litigate the issues of the public interest.”¹⁰⁹

In *Sherley v. Sebelius*,¹¹⁰ a recent case following *Data Processing*’s market share theory, plaintiff stem cell researchers, who had received research grants from the government, brought an APA action seeking review of the National Institute of Health’s (NIH) reinterpretation of the law governing stem cell research grants that would expand the class of individuals entitled to apply for the grants. Though the plaintiffs had been receiving research funding, and their own eligibility to apply for grants was unaffected by the NIH’s new interpretation, the plaintiff researchers argued that the new interpretation would permit more competitors to apply for funding, thereby diminishing their likelihood of obtaining funding. The D.C. Circuit credited this theory, finding the researchers had standing to challenge the interpretation because it “would result in increased competition for limited federal funding and would thereby injure their ability to successfully compete for . . . research funds.”¹¹¹ In other words, the agency’s action threatened to decrease the plaintiffs’ potential market share of federal grants, and this threat to potential future value was a sufficient interest to establish standing. The court explained, “We see no reason any one competing for a governmental benefit should not be able to assert competitor standing when the Government takes a step that benefits his rival and therefore injures him economically.”¹¹² The court observed that this could encompass a range of scenarios, “for example, a seller facing increased competition may lose sales to rivals, or be forced to lower its price or to expend more resources to achieve the same sales, all to the detriment of its bottom line.”¹¹³ A party could presumptively meet standing requirements based solely on the threat of illegally increased competition before actual injury occurs, “[b]ecause increased competition almost surely injures a seller in one form or

against tortuous invasion, or one founded on a statute which confers a privilege”) (quoting *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939)).

109. *Id.* at 154 (quoting *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940)).

110. 610 F.3d 69 (D.C. Cir. 2010).

111. *Id.* at 71.

112. *Id.* at 72.

113. *Id.*

another,” and thus “he need not wait until allegedly illegal transactions . . . hurt [him] competitively before challenging the regulatory (or, for that matter, the deregulatory) governmental decision.”¹¹⁴

These cases, in which standing has been found based on an entity’s potential market share, suggest that a tradable right holder’s interest in the market for the rights would also be a sufficient individual interest for standing. By establishing the holder’s concrete economic interest in the value of transferable rights, Tradable-rights programs could establish the holder’s standing to challenge illegal actions that threaten to devalue his share of the market for those rights, or diminish the amount of rights available. This could occur if an agency were to illegally allow overuse of the resource, allow others to use the resource without paying for the rights to it, or take any other illegal action that increased the depletion of the resource. As a result, the aggregate resource consumption level would approach the annual ceiling, thus diminishing the amount of resource use permitted overall and per quota share during that time period.

B. Meeting the Causal Nexus Requirement

The second and third prongs of the standing determination, taken together, require the plaintiff to demonstrate that there is a causal nexus between the agency’s action and the impact on the plaintiff’s concrete interest. In particular, the plaintiff must demonstrate that the agency’s action will directly cause the plaintiff’s individualized injury such that the potential injury could be redressed by a favorable decision. As the Court observed in *Lujan*, establishing a causal nexus between a regulatory failure (usually with respect to a third party) and the harm to the plaintiff’s individual interest is difficult for environmental plaintiffs. The court has rejected the “ecosystem nexus” standing theory that anyone who uses any part of a continuous ecosystem is adversely affected by activity that impacts a part of the ecosystem.¹¹⁵ However, in cases discussed above, where plaintiffs are competing in a market with the “regulated (or regulable) third party,” courts found that the causation and redressability requirements were satisfied. While plaintiffs were not “the object of the government action or inaction [they] challenge,”¹¹⁶ the agency’s action clearly caused their injury such that the injury would be redressed by a favorable decision. As the court noted in *Sherley*, “economic actors ‘suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition’ against them,” and it is “clear the [plaintiff’s] alleged injury was traceable to the [agency’s action] and redressable by the

114. *Id.* (internal citations omitted).

115. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66 (1992). The Court also rejected “animal nexus” and “vocational nexus” theories. *Id.*

116. *Id.* at 561-62.

court.”¹¹⁷ The cases in which standing was based on a property interest also suggest that plaintiffs whose property interests are implicated face less of a burden in establishing causation and redressability.¹¹⁸

The concrete individual interests of a tradable-rights-holding plaintiff—both the amount of permitted depletion per resource right and the market value of the rights—depend on the aggregate availability of the resource. It is thus impacted by all agency actions that threaten to deplete or mismanage the resource on whole, even if there is no particular effect on a specific portion of the resource the rights holder uses. This includes agency actions with respect to third parties that will impact the overall market for resource rights. Plaintiffs holding tradable rights could establish causation and redressability by showing that the challenged agency action (or inaction) or private violation is likely to impact overall abundance of the resource. Because the value of the holders’ tradable rights is necessarily determined in accordance with the overall use ceiling, which is based on aggregate availability of the resource, there is a direct causal connection between any illegal action threatening the resource’s aggregate abundance and the amount of resource use represented by each tradable-rights unit. Or, in a different and even easier scenario, plaintiffs holding tradable rights could establish causation and redressability where the agency permits others to deplete the resource without purchasing necessary permits, thereby reducing the market for and price of tradable rights. This averts the *Summers* problem of showing that the general regulatory action with respect to a third party, while likely to impact the resource overall, will likely harm a portion of the resource in which the plaintiff has a particular individualized interest. I will further illustrate this connection in the case studies discussed in Part V.

C. Meeting the “Zone of Interests” Requirement

In addition, owning tradable environmental rights also would enable a plaintiff to meet the “zone of interests” requirement for APA review. The zone of interest standard has been met by plaintiffs who have financial or private interests that are impacted by agency action, even when the agency’s broader purpose or mandate is unrelated those plaintiffs’ private interests.¹¹⁹

There are two strands of doctrine regarding the type of interest necessary to be within the “zone of interests” entitled to challenge agency implementation of environmental protection laws. The majority of decisions find an economic

117. *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)).

118. See Section V.a.i, *infra*.

119. See *Bennett v. Spear*, 520 U.S. 154 (1997) (holding that ranchers’ financial interest was sufficient for standing to seek review of a biological opinion issued under the ESA about a threatened species, even though the ESA was designed primarily to protect the interests of endangered species, and not ranchers).

interest to be a sufficient interest for a plaintiff to be within the “zone of interests” entitled to APA review. The Court has maintained that

the fact of economic injury is what gives a person standing to seek judicial review under the [APA’s review provision], but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.¹²⁰

These cases make it more difficult for environmental plaintiffs whose interests are ideological, scientific, or otherwise not purely economic, to establish that they are within the “zone of interests” of the statute in question. On the other hand, a narrow strand of cases under NEPA holds that a solely economic interest does not bring a plaintiff within the zone of interests contemplated by NEPA and is not a sufficient basis for standing to sue for noncompliance with the Act.¹²¹ These cases create barriers for plaintiffs who may have legitimate grievances of noncompliance with the Act’s requirements for assessing the environmental impacts of agency action, but whose sole connection to the agency action in question is potential economic loss.

It seems that tradable environmental rights confer interests upon holders that meet both of these economic and non-economic “zone of interests” standards. Tradable environmental rights establish holders’ economic interests in enforcement of legislation governing underlying resources and therefore meet the standard under a majority of cases holding that economic interest establishes plaintiff as being within the zone of interests. Tradable rights also establish a unique type of economic interest in environmental resources that is contemplated within the statutory scheme and directly and deliberately tied to effective enforcement of environmental regulations, which should meet the requirements of NEPA cases requiring more than sole economic interest. An environmental regulation statute creating a tradable-rights program contemplates the interests of tradable rights holders above those with incidental economic interests in the outcome of regulatory decisions. As Tradable-rights programs are designed to supplement regulatory legislation and to create incentives for rights holders to manage resources, the interest of rights holders cannot be “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit”¹²² for any statute prescribing or impacting governance of the underlying resource. In the next Part, I will discuss examples of how Tradable-rights programs would enable holders to meet individual interest, causation/redressability, and “zone of interests” requirements.

120. *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972); *see also Lee v. Resor*, 348 F. Supp. 389, 392 (M.D. Fla. 1972) (“Economic injuries will provide standing sufficient to justify judicial review, even in situations where there is no statutory provision granting such review.”).

121. *See supra* note 71 and accompanying text.

122. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987).

V. Case Studies

In this Part, I will discuss two currently operating tradable environmental rights programs—individual transferable fishing quotas and tradable development rights in the New Jersey pinelands—to illustrate the ways in which these programs could be used to confer standing on litigants seeking to enforce environmental regulations. Then I will briefly discuss litigation involving tradable rights illustrating that they have served as a basis for standing in other contexts.

A. *Individual Transferable Fishing Quotas*

To promote conservation and management of fisheries resources in the U.S. and its coastal waters, the federal Fishery Conservation and Management Act (FCMA) divided federal responsibility for fisheries among eight regional councils and enabled them to adopt individual fishing quota (IFQ) programs to manage fisheries.¹²³ In 2002, the eleven federal fisheries operating under IFQ programs accounted for fifty-three percent of the overall volume of federal fisheries.¹²⁴ IFQ programs allocate quota shares in the regional “pool” of their fish species among eligible fishermen in order to fish in the region. These quota shares entitle the holder to a given percent of the total allowable catch within the pool that year. Each year, Regional Fishing Councils determine the total allowable catch based on the health of the regional fishery and the amount of fish allocated to IFQ fisheries, which is determined in relation to annual global fishing limits on the species.¹²⁵ Quota holders are permitted to catch the volume of fish proportional to their quota share of the total allowable catch each year, which is determined in relation to the aggregate amount of fish all fisheries are permitted to catch that year. “Authorized pounds for annual IFQ permits are determined by the number of [quota share] units held, the total number of [quota share] units in the ‘pool’ for a species and area, and the total amount of halibut or sablefish allocated for IFQ fisheries in a particular year.”¹²⁶ Fishing quota holders can buy, sell, lease, or otherwise transfer some or all of their shares, depending on how much or how little they want to participate in the

123. 16 U.S.C. §§ 1801, 1852 (2006); Sarah Bittleman, *Toward More Cooperative Fisheries Management: Updating State and Federal Jurisdictional Issues*, 9 TUL. ENVTL. L.J. 349, 355 (1996).

124. Wyman, *supra* note 80, at 170.

125. U.S. GEN. ACCOUNTING OFFICE, GAO-04-277, *INDIVIDUAL FISHING QUOTAS: METHODS FOR COMMUNITY PROTECTION AND NEW ENTRY REQUIRE PERIODIC EVALUATION* 6 (2004). For example, each year the International Pacific Halibut Commission (IPHC) applies a preset formula to its updated findings on the abundance and health of the halibut population in order to determine the overall limits on the biomass of halibut that may be taken during the upcoming year. For a discussion of this, see STEPHEN R. HARE, *POTENTIAL MODIFICATIONS TO THE IPHC HARVEST POLICY* (2010), available at <http://www.iphc.int/papers/HPupdate.pdf>.

126. *Individual Fishing Quota (IFQ) Program*, NAT’L MARINE FISHERIES SERV.: ALASKA REGIONAL OFFICE, <http://www.fakr.noaa.gov/ram/ifq.htm> (last visited Dec. 5, 2011) (emphasis added).

fishery.¹²⁷ Fishers who catch less than their percentage may sell surplus fishing allowances to those who wish to catch more.

Holding fishing quota shares would likely confer standing on plaintiffs who would otherwise have difficulty establishing that an agency's regulatory action with respect to a third party would injure that portion of the population that comprises the plaintiffs' individualized interest. The easiest case is a challenge to an agency's failure to enforce or implement the quota system against third parties. Because enforcement of quota requirements is necessary to maintain the value of quotas, every quota holder has a concrete and particular interest in ensuring that quota requirements are enforced against all others. Failure to enforce quota requirements against a third party (allowing the third party to catch more fish than the amount to which his shares entitle him) directly impacts the concrete value of every quota holder by undermining the value of the quotas. This failure provides an immediate advantage to a competitor who fishes without paying for a quota. In addition, the enforcement failure directly devalues the quota shares on the secondary market by reducing demand for such quota shares. This automatically establishes the nexus between the failure to regulate the third party and the plaintiff's injury akin to the standing theory in *Sherley*, where the causal nexus was "clear" "when the Government takes a step that benefits [a plaintiff's] rival and therefore injures him economically."¹²⁸

A more challenging, but nonetheless viable case would be a citizen enforcement action to prosecute a violation of another environmental law with a citizen suit provision, such as the CWA. Because the quotas are framed in terms of percent of total allowable catch, and the total allowable catch is determined with reference to international or regional abundance of the fish species, a fishing quota holder could have standing to prosecute any private violation of the CWA that threatens the aggregate regional fish population, since it is likely to impact the value of his quota shares.¹²⁹ This same theory could be employed for challenges to any regulatory failure that results in a lapse in the protection of fish populations, such as the MMS's mismanagement of oil drilling, or in a failure to comply with NEPA (failing to issue environmental impact statements, for instance) that might threaten the aggregate or regional fish population.

This is so regardless of whether the private violation threatening the fish population is proximal to the quota holder or physically threatens the local population from which he draws his catch. This is because any action reducing the total fish population would reduce the total allowable catch that year, which

127. U.S. GEN. ACCOUNTING OFFICE, *supra* note 125.

128. *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010).

129. Various CWA violations, even remote from fisheries, may impact fish populations. Runoff into rivers from storm sewers, in which insecticides or other toxins are dumped, may harm fish populations down-river. See Lozeau, *supra* note 30, at 444-45.

would decrease the volume of fish represented by each quota share, or the volume of *permitted* catch per each quota share. Quota holders would have to purchase more quota in order to fish the volume to which they would have been entitled without damage to the overall fish population. Thus, the plaintiff can show causation of his individual injury solely by establishing the threat to the aggregate resource, since that injury to the resource on the whole automatically causes him individualized injury, as well: The threat reduces the amount of fish he is *permitted* to catch, regardless of whether he can establish a specific threat to his local population or the amount he is *physically able* to catch. The *Summers* problem and discussion of events preceding the Gulf oil spill illustrate that it is substantially easier to prove that a third party's violation of, or failure to enforce, regulations will cause damage to the overall fish population than it is to prove the violation causes damage to a specific portion of the resource, and that the plaintiff has an individualized interest in that specific portion.

B. New Jersey Pinelands Transferable Development Rights

New Jersey's Pinelands Development Credit Program implements tradable development rights (TDRs) in order to facilitate conservation of the New Jersey Pinelands, a National Reserve containing the largest pinelands in the world including approximately one million acres of forests, wetlands, creeks, and rivers.¹³⁰ The Pinelands TDR program governs development in seven counties and fifty-two municipalities in the Pinelands region. It operates by allocating a fixed number of development credits to each parcel of land and restricting land development to the credits possessed by that parcel. In order to further develop land, owners must purchase development rights that are absolutely scarce. TDRs are not only tradable among landowners. Conservationists and speculators may also acquire and hold them without owning land in the region. There are no region- or area-specific limitations on TDR sales: someone with excess credits in a preservation or agricultural area can sell credits to speculators and landowners in urban areas where there is growing pressure for development, such as the Pineland areas adjacent to the Atlantic City, Philadelphia, New York and Northern New Jersey metropolitan areas.¹³¹ The economic value of Pinelands TDRs is assured because of enforcement: developers must acquire development rights for each unit that they increase density of development. The broad geographic area covered and development in metropolitan areas ensures significant demand for development rights relative to their supply.¹³² Thus, as pressure for development increases,

130. N.J. STAT. ANN. § 13:18A-1 (West 2010).

131. Tripp & Dudek, *supra* note 80, at 378.

132. *Id.*

the price of development rights and the cost of depleting natural Pinelands increase.

Given a program like this, it seems a fairly easy case that an owner of TDRs could have standing to challenge an agency's failure to enforce the TDR requirements with respect to a third party. The theory would be the same as that previously described for IFQs: allowing any third party to increase development without purchasing the required TDRs would diminish the market for TDRs and undermine the value of TDRs for all other holders.

A more difficult, but nonetheless viable case, would involve using TDRs, which are essentially a share in the value of undeveloped forest land, as a basis for standing to challenge agency implementation of other environmental protection legislation that threatens undeveloped forest land, as in *Summers*. Because the Program is designed to encourage conservation of undeveloped forest land, TDRs are priced in accordance with available undeveloped forest land so that the cost of depleting undeveloped land reflects the scarcity of undeveloped land. If an agency takes an action, as in *Summers*, that threatens to illegally diminish the aggregate amount of undeveloped forest land, it would directly impact all TDR holders by increasing the scarcity of undeveloped land, decreasing the volume of development permitted per unit of development rights, and increasing the cost of development. As in the above discussion of IFQs, the causal nexus between the agency's illegal action and impact on any TDR holders' interest is automatically established by showing that the illegal action threatens the aggregate abundance of undeveloped land, as opposed to making the much more difficult showing that the regulatory failure will impact a specific tract of forest in which the plaintiff has a physical interest. It is empirically much easier to demonstrate that an aggregate decrease in undeveloped land will reduce the amount the plaintiff is *permitted* to develop than to make the *Summers*-like showing that the plaintiff's particular tract of land will likely be physically impacted.

C. Litigation Involving Tradable Rights

No court has directly addressed the question of whether owning tradable rights to an environmental resource is a sufficiently concrete individual interest to challenge noncompliance with regulations governing the underlying resource. However, litigation involving tradable rights suggests that they represent a sufficient interest for standing to challenge actions directly impacting the value of the rights. In the most informative case, the Northern District of New York considered a suit challenging a New York law requiring all sulfur dioxide emissions allowances to be sold with a restrictive covenant barring later transfer to users in certain states. The suit was brought by the Clean Air Markets Group (CAMG), an organization whose purpose is to promote the use of tradable allowances and one member of which held emissions allowances. The district court held, and the Second Circuit affirmed,

that because attaching this restrictive covenant lowered the value of allowances 2.5-5.0%, CAMG's allowance-owning member "has suffered a diminution in value of its SO₂ allowances, an injury in fact."¹³³ The district court rejected the defendant's claim that the allowance owner did not meet standing requirements because it did not actually sell its allowances. It was sufficient injury that the plaintiff "establish[ed] that the *loss in value* of . . . [its] SO₂ allowances was caused by New York's requirement."¹³⁴ Because the plaintiff was challenging government action that pertained to the tradable-rights instruments themselves, as opposed to the underlying resource, this case differs from the scenarios contemplated in the above case studies, where tradable rights would be the basis for standing to sue when regulatory failure pertains to regulating the underlying resource. This case nonetheless shows that a small reduction (2.5-5.0%) in the *value* of tradable rights would be a sufficiently concrete and particularized interest for standing purposes.

Another case involving tradable rights further suggests that they are a sufficient interest to confer a right to sue on the holder. *Ormet Corp. v. Ohio Power Co.*¹³⁵ did not address a standing question, but the Fourth Circuit found federal question jurisdiction over a dispute involving tradable allowances. In doing so, the court addressed the judicial remedies available to parties with interests in tradable allowances. This case was a dispute between two parties about who was entitled to a large percentage of the emissions allowances the EPA had issued to a power generating station. The litigants contended that the emissions allowances were worth \$40 million. Finding federal question jurisdiction over this dispute, the panel observed that Congress intended "for allowances to trade as a commodity with durable economic value," and explained:

In establishing a system of marketable allowances, Congress intended for disputes among allowance holders to be resolved in the same manner as are other private commercial disputes The Act creates proprietary interests in emissions allowances and provides for their transferability. While the Act gives certain persons rights to those allowances, it provides no mechanism for enforcement of those rights. On the contrary, the Act . . . seeks only to clarify "the ways in which the allowance system would mesh with private-commercial relationships" We believe it clear that Congress intended that disagreements over the allocation of allowances be resolved by existing methods of dispute resolution.¹³⁶

This statement that the allowance holders have "proprietary interests" which Congress intended to be litigated the same way as other "private commercial disputes" also suggests that owners of tradable allowances have an

133. *Clean Air Mkts. Grp. v. Pataki*, 194 F. Supp. 2d 147, 156 (N.D.N.Y. 2002), *aff'd*, 338 F.3d 82 (2d Cir. 2003).

134. *Id.* (emphasis added).

135. 98 F.3d 799 (4th Cir. 1996).

136. *Id.* at 801 (internal citation omitted).

individual interest sufficient for standing to litigate matters involving the value of the allowances.

Conclusion

This Note has argued that owning tradable rights may avert barriers to standing for plaintiffs bringing APA review or citizen enforcement actions to enforce implementation of or compliance with environmental regulation. Tradable-rights ownership could enable plaintiffs to meet the constitutional standing requirements of both (a) concrete and particularized individual interest and (b) causation/redressability. Furthermore, it would establish a plaintiff within the “zone of interests” contemplated by the regulatory legislation.

A. Confronting Potential Objections

Readers may offer a number of objections to this potential application of tradable rights. First, the argument that a threatened reduction in the value of a given quota share creates a cognizable property interest for standing purposes defies the legislature’s express choice not to call the entitlements “property” for fear of invoking Takings liability. It is true that the legislature did deliberately immunize the government from Takings liability for adjustments in tradable-rights allotments, which are part of the conservation program. However, this objection overlooks an important logical distinction between the type of interest that should be required for Takings liability and that which should be required for standing to bring an action seeking only declaratory relief, such as an APA review or citizen enforcement action. Immunity from Takings claims should not preclude the availability of APA review or citizen enforcement actions, which must be based on *illegal* action of a private violator or an implementing agency and seek only to enjoin that illegal action. Takings liability is distinct because it is not based on illegal action, but requires compensation even when the Government’s actions are legal. Precluding Takings liability for tradable rights ensures that the government is not liable for *legal* adjustments in quota allotments necessary to execute the regulatory scheme. These adjustments, if made legally, would never be a basis for a citizen suit or APA review action because the agency has not violated the law. Therefore, my scheme does not impact program administrators’ immunity from Takings liability based on legal adjustments in tradable-rights allotments.

It follows that the interest required to invoke Takings liability, in which a plaintiff is seeking compensation for lost property regardless of liability, would be more concrete than the interest required for standing where plaintiffs are merely seeking to show that they have a sufficient stake to enjoin illegal action, but are not seeking compensation for the lost value. The law seems to accept that there are varying levels of property-like interests that give rise to different degrees of legal protection: the strongest property interests invoke Takings

liability, lesser interests may not give rise to Takings liability but nonetheless warrant Due Process protection, and even less concrete private interests may be cognizable for standing.¹³⁷ This objection based on Takings liability overlooks the distinction between less absolute property interests that are judicially cognizable for the purpose of standing and absolute property interests that are a basis for Takings liability.

A second concern might be that using tradable rights this way could enable activist groups to purchase rights for the sole purpose of obtaining standing. This could potentially alter the market for rights, raising demand and overall prices. There are several possible responses to this concern. First, because these are actions for injunctive relief only, there is no threat of a single violation generating a series of actions from multiple plaintiffs seeking compensation. While one activist group could theoretically attempt, as a group or through a member, to obtain associational standing, there would be little risk of multiple parties doing so. Once an action for injunctive or declaratory relief is litigated or a citizen suit prosecuted, other citizens could not bring the same complaint. Accordingly, insofar as the proposal this Note outlines would allow plaintiffs to purchase rights for the purpose of bringing litigation, their impact on the market would likely be minimal.

Second, the prospect of would-be plaintiffs altering the value of rights in order to obtain standing is no more problematic than the impact of conservationists purchasing and holding rights to decrease overall resource depletion: the price would go up either way. Many Tradable-rights programs permit the latter behavior because it allows the market to reflect the value of the resource to conservationists as well as users. Permitting all interested parties to participate in the market enables more accurate pricing of resource use, reflecting the value of the resource to users and other parties alike. This Note suggests that resources are not only valuable to those who wish to consume them and those who wish to preserve them, but also to those who seek to hold shares in a resource to confer standing for litigation. When a conservationist purchases and holds a tradable right without using it, rights generally become more scarce and expensive for all users, and the resource's value to conservationists is factored into the cost of depletion. If an interest group purchased tradable rights for standing purposes the market would also reflect their interest in regulation or management of the underlying resource and the resource would be priced even more accurately, taking into account a broader range of interested parties.

137. For a discussion of variance in the strength of property interests, see Merrill, *supra* note 87, at 952-54, which describes a "patterning definition" of property and observes that an interest may qualify as property for commodity, economic, and standing purposes, but not for constitutional purposes. There are many property interests, such as employment benefits or entitlement to a license, that are cognizable for Due Process purposes—without invoking Takings liability. And such a property interest that triggers Due Process protection would certainly be a sufficient interest for standing, even though it does not trigger Takings liability.

Third, activist groups seeking associational standing to challenge agency action already engage in this practice when possible. The plaintiff in *Clean Air Markets Group*, discussed above, was an advocacy organization interested in promoting use of tradable emissions. It based its associational standing on one member who owned tradable rights. This did not cause a problem for the tradable-rights market because no other plaintiff sought to bring a suit for declaratory or injunctive relief of that nature. Once the suit was brought and the New York law was declared invalid under the Clean Air Act, no other activist group had any reason to acquire tradable rights in that market. Analogously, associations seeking to challenge agency failure to enforce regulation may find a plaintiff with property near affected land to serve as lead plaintiff in citizen suits or APA actions,¹³⁸ yet no observers have concluded that this practice disrupts the housing market in such areas. The market for resource-based litigation simply is not big enough to harm overall trade in tradable rights.

On a related point, skeptics worry that using tradable rights as a basis for standing in citizen suits and APA review actions might discourage legislation providing for tradable-rights programs. This concern loses sight of the fact that this discussion applies only to laws in which the legislature has expressly attempted to enable citizens to sue via citizen suit provisions and APA review actions. In the cases contemplated by this discussion, court-imposed standing requirements have prevented citizens from suing even though statutes granted them the right to do so. Since plaintiffs relying on tradable rights would still need a cause of action under a citizen suit provision or the APA, the tradable rights would only enable standing in cases in which the legislature has otherwise chosen to provide causes of action to citizen plaintiffs. If Congress does, at some point, want to enact a tradable-rights program while barring standing for enforcement suits based on those rights, it would presumably enact the statute without a citizen suit provision, and it could also stipulate in the legislation that rights holders are not within the “zone of interests” of the legislation as is required to obtain APA review.

B. Advantages of Tradable Rights as a Basis for Standing

In Part III, I discussed two main arguments against citizen enforcement actions: (a) that they open the floodgates for frivolous enforcement actions; and (b) that they violate the constitutional requirements of Article I and Article III. Using tradable rights as a basis for standing in citizen suits could ameliorate both of these criticisms.

The tradable rights basis eliminates both elements of the floodgates concern: that too many plaintiffs would bring enforcement actions, and that these actions would be based on frivolous violations of technical requirements

138. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000); *Sierra Club v. Morton*, 405 U.S. 727 (1972).

that are not actually environmentally harmful. The first element of the floodgates concern—too many plaintiffs bringing actions—would be eliminated. Primarily, it is important to emphasize that the causes of action in these cases only permit one suit per legal violation, since they limit remedies to an injunction. These causes of action therefore do not tend to give rise to “floodgates risks.” Once a plaintiff successfully challenges a violation and it is enjoined, there is no cause for other plaintiffs to bring claims since they cannot obtain individual damages. Relying on tradable rights would ensure that the one suit brought to challenge a violation is brought by one of few individuals who substantiate their stake in compliance with a financial interest in rights, that are necessarily scarce and expensive. As the Court in *Data Processing* observed, “[c]ertainly, he who is ‘likely to be financially’ injured may be a reliable private attorney general to litigate the issues of the public interest”¹³⁹ This would filter out plaintiffs without sufficient interest or resources to advocate zealously.

The second element of the floodgates concern—enabling frivolous suits based on trivial violations of technical provisions—is also ameliorated. Using tradable rights as a basis for standing in citizen suits would ensure that plaintiffs *only* had standing to prosecute violations that were truly material. A plaintiff bringing a citizen suit on the basis of his tradable rights *only* has standing where the agency’s illegal action actually threatens to devalue the rights. This would only be the case if the agency materially deviated from the regulatory scheme, either by failing to enforce the quotas or by taking some other action that altered the overall scarcity of the resource, thereby increasing the cost of rights to use the resource.

The discussion of cases permitting standing in which the plaintiff has a property interest or a financial interest in a market that is impacted by illegal action illustrates how the two constitutional infirmities commonly attributed to citizen enforcement, the alleged violation of the Take Care Clause in Article II and the Case or Controversy Clause in Article III, are avoided if standing is based on an interest in tradable rights. All of the cases in which standing was based on either a property interest, a statutory entitlement akin to a property interest, or a financial interest in a market suggest that individuals can bring claims to protect their private rights without intruding upon the Executive’s obligation to “take Care that the Laws are faithfully executed.”¹⁴⁰ When tradable rights form the basis of a plaintiff’s individual interest in a citizen enforcement action, he is suing based on an analogous private interest. When a litigant bases his interest on tradable rights, the cases show that the action also clearly meets the case-or-controversy requirement: the parties have a concrete

139. *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (quoting *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940)); *accord* *Sherley v. Sebelius*, 610 F.3d 69 (D.C. Cir. 2010).

140. U.S. CONST. art. II, § 3.

private interest at stake, the value of which is threatened by allegedly illegal agency action.

This approach to standing differs from a legislative conferral of an abstract procedural right to enforcement upon all citizens because environmental privatization programs create real and tangible interests that are scarce and have independent market value. By definition these rights cannot be conferred upon all citizens, and therefore inherently vest holders with a concrete interest in agency enforcement that is a “particularized one, which sets him apart from the citizenry at large.”¹⁴¹ Because the value of each holder’s right is directly and necessarily tied both to effective enforcement with permit requirements and aggregate abundance of the resource, rights holders face injury that is traceable to any illegal action affecting the resource’s aggregate abundance or the market for tradable rights.

Insofar as a concrete and particularized individual interest is the real barrier to citizen participation in agency oversight, private tradable rights created by environmental privatization programs should confer standing on holders to challenge regulatory failures and private violations that threaten the underlying resource. Even if courts were to reject this theory of standing, considering it is nonetheless enlightening, as it interrogates the values that really animate courts in determining whether to adjudicate disputes between members of the public and the executive regarding implementation of regulatory legislation.

141. Scalia, *supra* note 39.

